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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 295

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

vs.

LAWRENCE WAREHOUSE COMPANY, CATTLE LOAN, INC., DOLLY GOODALL, J. P. [illegible] AND [illegible] W. KEETLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [illegible]

PETITION FILED [illegible]

CERTIORARI GRANTED [illegible]

No. 11418

United States

Circuit Court of Appeals

For the Ninth Circuit.

LAWRENCE WAREHOUSE COMPANY, a corporation,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY, a corporation,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Trial before the Honorable Louis E. Goodman, District Judge, sitting without a jury.

In the United States District Court for the Northern District of California, Southern Division.

No. 23171 G

DEFENSE SUPPLIES CORPORATION,

Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, CAPITOL CHEVROLET COMPANY, a corporation, CLYDE W. HENRY, CONSTANTINE PARELLA, V. J. McGREW, CHARLES ELMORE, FIRST DOE COMPANY, a corporation, SECOND DOE COMPANY, a corporation, FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT

Plaintiff complains of defendants and each of them and for a cause of action alleges: [1*]

I.

This is a civil action. The amount in controversy exceeds $3,000.00, exclusive of interest and costs. The jurisdiction of this court is conferred by reason of the amount in controversy and by reason of sections 41 (1) and 42 of Title 28 of the United States Code, the government of the United States being the owner and holder of more than one half

* Page numbering appearing at foot of page of original certified Transcript of Record.

of the capital stock of the plaintiff, Defense Supplies Corporation.

II.

At all times herein mentioned plaintiff was and now is a federal corporation created by and organized under an act of Congress of the United States, to wit, Section 5d of "Reconstruction Finance Corporation Act" (Act of January 22, 1932, Chapter VIII, 47 Stats. at L., p. 5, Title 15 U. S. C. A., para. 601-607, inclusive), as amended and supplemented, and derives its existence, faculties and powers therefrom, and all of its capital stock and assets are wholly owned by the government of the United States. Said Defense Supplies Corporation is an agency, arm and instrumentality of the United States for carrying out the purpose and objects of its incorporation by Congress, and has been at all times since its creation engaged solely in carrying out such purposes and objects and has the power to contract and be contracted with, sue and be sued in its corporate name as such, to acquire property and property rights and to exercise ownership of and to protect the property and property rights so acquired and hereinafter referred to as well as to enforce the rights vested in it under and by virtue of such law of the United States and more particularly to engage in acts and transactions hereinafter set forth. [2]

III.

Defendant Lawrence Warehouse Company is now and at all times herein mentioned has been a cor-

poration duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

IV.

Defendant Capitol Chevrolet Company is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Sacramento, State of California.

V.

At all times mentioned herein plaintiff has been and now is the owner and entitled to the immediate possession of certain quantities of tires and tubes, to wit, 27,601 tires and 1,850 tubes. On or about April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company wrongfully and unlawfully converted to their own use and benefit all of said tires and tubes.

VI.

The value of said goods so converted by defendants Lawrence Warehouse Company and Capitol Chevrolet Company to their own use was, on or about April 9, 1943, the sum of $76,000.00, and neither said defendants nor any other person has paid the same or any part thereof to plaintiff and the same is now wholly due, owing and unpaid.

As and for a Second and Separate Cause of Action, plaintiff alleges: [3]

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III, and IV of its first cause of action, to which reference is hereby made, and the same are hereby incorporated in this second cause of action and made a part hereof as though set forth in full.

II.

Prior to April 9, 1943, plaintiff delivered to defendants Lawrence Warehouse Company and Capital Chevrolet Company, who were then and there doing a general storage and warehouse business, at their warehouse known as the "Ice Palace," in West Sacramento, California, certain quantities of tires and tubes, to wit, 27,601 tires and 1,850 tubes, for storage and safe keeping. Said defendants agreed to and did receive possession of said goods for said purpose, and plaintiff agreed to pay said defendants their storage charges for storage and keeping said goods, which said charges have been fully paid by plaintiff to said defendants. Plaintiff at all times herein mentioned was the owner of said tires and tubes and entitled to their immediate possession, and said tires and tubes were, on April 9, 1943, of the value of and reasonably worth the sum of $76,000.00

III.

On or about April 9, 1943, and while said tires and tubes were in the possession of defendants

Lawrence Warehouse Company and Capitol Chevrolet Company as aforesaid, said tires and tubes were consumed and totally destroyed by fire. Plaintiff has been damaged thereby in the sum of $76,000.00.

As and for a Third Separate Cause of Action, plaintiff alleges:

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III and IV of its first cause of action and paragraphs II of its second cause of action, to which reference is hereby made, and the same are hereby incorporated in this third cause of action and made a part hereof as though set forth in full.

II.

At all times herein mentioned defendants First Doe Company and Second Doe Company were and now are duly organized and existing corporations.

III.

Plaintiff is ignorant of the true names of defendants sued herein as First Doe Company, a corporation, Second Doe Company, a corporation, First Doe and Second Doe, and prays that when their true names are discovered this complaint and all papers and proceedings herein may be amended so as to set forth the true names of said defendants.

IV.

On or about April 9, 1943, while said tires and tubes were stored at said warehouse, as aforesaid,

and while said warehouse was under the exclusive management and control of defendants Lawrence Warehouse Company, Capitol Chevrolet Company, Clyde W. Henry, Constantine Parella, V. J. McGrew, Charles Elmore, First Doe Company, Second Doe Company, and First Doe and Second Doe, said defendants negligently caused and permitted said tires and tubes to be consumed and totally destroyed by fire. [5]

V.

By reason of said negligent acts of said defendants, plaintiff has been damaged in the sum of $76,000.00.

As and for a Fourth and Separate Cause of Action plaintiff alleges:

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III and IV of its first cause of action, paragraph II of its second cause of action, and paragraphs II and III of its third cause of action, to which reference is hereby made, and the same are hereby incorporated in this fourth cause of action and made a part hereof as though set forth in full.

II.

On or about April 9, 1943, defendants Clyde W. Henry, Constantine Parella, V. J. McGrew, Charles Elmore, First Doe Company, a corporation, Second Doe Company, a corporation, First Doe and Second Doe negligently and carelessly caused an acetylene torch to be used on said premises in which plaintiff's

said goods were stored, as aforesaid, and used and operated said torch on said premises in a negligent and careless manner. By reason of such negligence and carelessness said torch set fire to said premises and caused the same, together with its contents, including plaintiff's said goods, to be consumed and totally destroyed by fire.

III.

On or about April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted [6] to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire. [7]

IV.

The negligence of each and all of the defendants concurred and joined together to destroy plaintiff's goods, as aforesaid.

V.

By reason of said negligent acts of said defend-

ants Lawrence Warehouse Company, Capitol Chevrolet Company, Clyde W. Henry, Constantine Parella, V. J. McGrew, Charles Elmore, First Doe Company, a corporation, Second Doe Company, a corporation, First Doe and Second Doe, plaintiff has been damaged in the sum of $76,000.00.

Wherefore, plaintiff prays judgment against defendants and each of them as follows: For the sum of $76,000.00, for costs of suit, and for such other and further relief as is meet and proper in the premises.

THEODORE H. MEYER,
BROBECK, PHLEGER, & HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 16, 1944. [7]

[Title of District Court and Cause.]

CAPITOL CHEVROLET COMPANY, a corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY,
CONSTANTINE PARELLA,

Cross-Defendants.

ANSWER OF DEFENDANT CAPITOL CHEVROLET COMPANY AND CROSS-CLAIM AGAINST CERTAIN DEFENDANTS.

Comes now the defendant Capitol Chevrolet Company, a corporation, and appearing for itself alone,

and answering plaintiff's complaint herein, admits, denies and alleges as follows:

Answering the First Cause of Action, this answering defendant admits denies, and alleges, as follows: [8]

I.

Defendant has not sufficient knowledge, information or belief to enable it to answer Paragraphs I, II and III of the First Cause of Action, and basing its denial upon that ground, denies each and every, the allegations thereof.

II.

Answering Paragraph IV of the said First Cause of Action, defendant admits that on April 9, 1943, it was a corporation duly organized and existing under and by virtue of the laws of the State of California; and having its principal place of business in the City of Sacramento, State of California.

III.

Answering Paragraph V of the First Cause of Action, this defendant denies generally and specifically, each and every, the allegations thereof.

IV.

Answering Paragraph VI of the First Cause of Action, this defendant denies generally and specifically, each and every, the allegations thereof, and denies that any sum whatsoever is due or owing or unpaid from this answering defendant to the plaintiff.

Answering Plaintiff's Second Cause of Action, this answering defendant admits, denies and alleges as follows:

I.

Repleads the denials and admissions of Paragraphs I, II, III and IV of the First Cause of Action with like force and effect as though said denials and admissions were herein repeated at length.

II.

Answering Paragraph II of Plaintiff's Second Cause of Action, this defendant alleges that said warehouse known as the "Ice Palace" in West Sacramento, California, was [9] rented by this defendant for the purpose of storing therein certain quantities of tires and tubes belonging to the plaintiff, and that such renting was with the knowledge and consent of the plaintiff, and was consummated only after the plaintiff had inspected the said premises and after plaintiff had inspected the fire prevention facilities available in or to the said building, and only after plaintiff had agreed to accept all risks from loss or damage which might occur to said tires and tubes while stored in the said building, resulting from fire. Defendant does not have sufficient knowledge, information or belief to enable it to answer the allegations of said Paragraph II as to the number of tires and tubes stored in said building at the time of said fire, nor of the reasonable value thereof and basing its denial upon that ground, denies the said allegations and denies that any tires in excess of 26,211 were stored in the

said building at the time of the said fire, and denies that the same were of the reasonable value of $76,000 or any other sum in excess of $

III.

Answering Paragraph III of the Second Cause of Action, this Defendant admits the allegations thereof, except that defendant denies that plaintiff has been damaged in the sum of $76,000.00, or in any other sum by reason of any act or failure to act, or neglect of this defendant, or by reason of any failure on the part of this defendant to perform any obligation imposed upon this defendant by law or by any contract between the plaintiff and this defendant.

Answering Plaintiff's Third Cause of Action, this answering defendant admits, denies and alleges as follows:

I.

Repleads the denials and admissions to Paragraphs I, II, III and IV of the First Cause of Action and Paragraph II [10] of the Second Cause of Action with like force and effect as though said denials and admissions were herein repeated at length.

II.

Answering Paragraph IV of Plaintiff's Third Cause of Action, this defendant denies, generally and specifically, each and every, the allegations thereof.

III.

Answering Paragraph V of said Third Cause

of Action, this answering defendant denies that plaintiff has been damaged in the sum of $76,000.00 or in any other sum by reason of any negligent act or acts of this answering defendant, and denies that the consumption and destruction of said, or any tires or tubes was directly or indirectly caused by any negligence whatsoever on the part of this answering defendant.

Answering Plaintiff's Fourth Cause of Action, this answering defendant admits, denies and alleges as follows:

I.

Repleads the denials and admissions to Paragraphs I, II, III and IV of the First Cause of Action and Paragraph II of the Second Cause of Action and Paragraphs II and III of the Third Cause of Action with like force and effect as though said denials and admissions were herein repeated at length.

II.

This answering defendant has not sufficient knowledge, information or belief to enable it to answer Paragraph II of said Fourth Cause of Action, and basing its denial on that ground denies, each and every, the allegations thereof.

III.

This answering defendant denies generally and specifically, each and every, the allegations of Paragraph III of said Fourth Cause of Action. [11]

IV.

Answering Paragraph IV of said Plaintiff's Fourth Cause of Action, this defendant denies generally and specifically, each and every the allegations thereof, and denies that by reason of any act or any failure to act or any negligence whatsoever on the part of the answering defendant, plaintiff has been damaged in the sum of $76,000.00 or in any other sum, and denies that this answering defendant was guilty of any negligence whatsoever in the premises.

For a further, Separate and Affirmative Defense, this Answering Defendant Alleges:

I.

That said complaint does not, nor does any count or Paragraph thereof, state facts sufficient to constitute a cause of action against this answering defendant.

II.

That at all times in the complaint mentioned and at the time of the fire alleged in plaintiff's complaint, the said plaintiff maintained a watchman in the said Ice Palace building where the said tires and tubes were stored, and that said watchman was under the sole direction and control of the plaintiff. That it was the duty of the said watchman to protect the said tires and tubes from loss or damage by fire and that the operations of the defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore, as alleged in Paragraph II of Plaintiff's Fourth Cause of Action, were

being carried out with the knowledge and consent of the said watchman, and that the plaintiff at all times in the complaint mentioned, through its said watchman, had full knowledge of and consented to the acts of the said defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore alleged in said Paragraph II of Plaintiff's Fourth Cause of Action. [12].

III.

That if any negligence of any person, firm or corporation caused the said fire, the plaintiff was guilty of contributory negligence in permitting and consenting to the said acts having full knowledge of the nature thereof and in having failed to prohibit or prevent the said acts, or any of them; and in having full knowledge of the nature of said acts and having failed to take, or to require Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore or any of them to take any precautionary measures to prevent the occurance of the said fire.

IV.

That at none of the times mentioned in plaintiff's complaint did this answering defendant have any jurisdiction or control over said defendants Clyde W. Henry, Constantine Parella, V. J. McGrew or Charles Elmore, or either or any of them, and that none of said defendants were employed by or were the agents of or authorized to act for this defendant.

V.

That this answering defendant was in possession of the said Ice Palace wherein the said tires and tubes were stored, pursuant to a written lease dated March 1, 1943, wherein Clyde W. Henry and Constantine Parella are lessors and this answering defendant is the lessee. That said lease provides among other things that lessors shall have the right at all times during the term of said lease to enter the said leased premises for the purpose of examining or inspecting the same and of making such repairs or alterations therein, or any other parts of said building as said lessor shall deem necessary in connection with said premises or said building. That at all times subsequent to its execution, the terms of the said lease were fully known to and approved by the plaintiff, and that plaintiff acquiesced therein and in the entry of the said lessors thereunder at the time the said fire occurred as is alleged in plaintiff's complaint. That in entering upon the said premises and in doing the acts alleged in plaintiff's complaint to have caused the said fire, the said lessors were acting pursuant to a right reserved to them under the said lease with the knowledge and consent of the plaintiff and were acting solely on behalf of the said lessors, and were not acting for or on behalf of, or for the benefit of the lessee, this defendant; and were not subject to any direction or control whatsoever of this defendant.

And for a Further and Separate Answer and by Way of Cross-Claim Against the Defendants Clyde

W. Henry and Constantine Parella; This Defendant and Cross-Claimant Alleges as Follows, to-wit:

I.

That on or about the 1st day of March 1943, the cross-claimant as lessee, and the cross-defendants Clyde W. Henry and Constantine Parella as lessors, entered into a certain lease dated March 1, 1943, wherein and whereby said cross-defendants leased to the cross-claimant the premises known as the "Ice Palace" in West Sacramento, County of Yolo, State of California. That said lease provides among other things, that said leased premises shall be used, occupied, and conducted exclusively as and for the storage of tires and for no other purpose. That said lease further provides among other things, that:

"10—Said lessor shall have the right at all times during the term of this lease to enter said leased premises for the purpose of examining or inspecting the same, and of making such repairs or alterations therein, or in other parts of said building as said lessor shall deem necessary in connection with said premises, or said building." [14]

II.

That cross-claimant is informed and believes and upon such information and belief alleges that on or about April 9, 1943, cross-defendants Clyde W. Henry and Constantine Parella, by and through their agents, servants, and employees entered into the engine and boiler room located in a building

attached to the said ice palace and then and there negligently and carelessly set fire to the said building attached to the said Ice Palace as aforesaid.

III.

That at the time of the said fire, this cross-claimant had stored in the said Ice Palace tires and tubes belonging to the plaintiff Defense Supplies Corporation, which said plaintiff Defense Supplies Corporation alleges to be of the reasonable value of $76,000.00 and that all of this was well known to the said cross-defendants at the time of the said entry of said cross-defendants.

IV.

That the said cross-defendants, through their agents, servants and employees, negligently and carelessly permitted the said fire, so negligently and carelessly caused by cross-defendants as aforesaid to spread to the said Ice Palace wherein the said tires and tubes were stored as aforesaid, and as a direct and proximate result thereof, the said Ice Palace building and the said tires and tubes stored therein, were wholly burned, consumed and destroyed.

V.

That at the time the said tires and tubes were destroyed, as aforesaid, this cross-claimant was in possession thereof as bailee for the plaintiff Defense Supplies Corporation, and that the said bailor Defense Supplies Corporation has made a demand upon this cross-claimant for payment of the sum

[15] of $76,000.00 alleged by said bailor to be the reasonable value of the said tires and tubes.

Wherefore, this answering defendant prays that plaintiff take nothing by this action as against this answering defendant, and that this answering defendant be hence dismissed with its costs herein, and

Secondly, that if the court shall find that the plaintiff is entitled to take any judgment whatsoever as against this answering defendant, then this answering defendant prays that he have judgment against the cross-defendants Clyde W. Henry and Constantine Parella, and each of them, for the amount of any judgment which may be rendered herein against this answering defendant, together with any costs or interest which may accrue thereon until the said judgment is paid and that this defendant and cross-claimant further have judgment against said cross-defendants Clyde W. Henry and Constantine Parella for its costs of suit and for such other and further relief as may be proper in the premises.

/s/ A. J. GETZ,

Attorney for Answering Defendant and Cross-Claimant Capitol Chevrolet Company, a Corporation.

(Affidavit of Service by mail.)

[Endorsed]: Filed April 14, 1944. [16]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CLYDE W. HENRY

Comes now defendant, Clyde W. Henry, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

Answer to First Cause of Action

I.

Answering the allegations in plaintiff's First Cause of Action contained, this defendant has no information or belief upon the allegations set forth in Paragraphs V and VI of said First Cause of Action sufficient to enable him to answer, and therefore denies each and every allegation therein contained.

Answer to Second Cause of Action

I.

Answering the allegations in plaintiff's Second Cause of [17] Action contained, this defendant has no information or belief upon the allegations set forth in Paragraphs II and III of said Second Cause of Action, and therefore denies each and every allegation therein contained.

Answer to Third Cause of Action

I.

Answering the allegation in plaintiff's Third Cause of Action contained, and specifically referring to Paragraph I of said Third Cause of Action,

this answering defendant denies all the allegations contained in Paragraph II of plaintiff's Second Cause of Action, which said paragraph plaintiff has incorporated in said Third Cause of Action.

II.

Answering the allegations contained in Paragraphs IV and V of said Third Cause of Action, this answering defendant denies each and every, all and singular, generally and specifically the allegations contained in said paragraphs.

Answer to Fourth Cause of Action

I.

Answering the allegations in plaintiff's Fourth Cause of Action contained, and specifically referring to Paragraph I of said Fourth Cause of Action, this answering defendant denies all the allegations contained in Paragraph II of plaintiff's Second Cause of Action, which said paragraph plaintiff has incorporated in said Fourth Cause of Action.

II.

Answering the allegations contained in Paragraphs II, III, IV and V said Fourth Cause of Action, this answering defendant denies each and every, all and singular, generally and specifically the allegations in said paragraphs contained.

As and for a separate and special defense to all causes [18] of action contained in plaintiff's complaint on file herein, and to all the allegations con-

tained in said First, Second, Third and Fourth Cause of Action, defendant Clyde W. Henry alleges as follows:

I.

That on or about the first day of March, 1943, defendant Clyde W. Henry and Constantine Parella were the owners of certain real estate in the County of Yolo, State of California, which property is more particularly described as follows:

Beginning at a point in the southeasterly line of the California State Highway right of way that extends between Sacramento and Davis and designated as Yolo County, route 6, section C, said point of beginning being situate north 85 degrees, 49 minutes east 1045.47 feet and thence north 73 degrees 45' 30" east 275 feet from the point of intersection of the southerly line of the right of way of said route 6, section C with the center line of the State Highway that extends southerly along the east line of Westacres Subdivision in Reclamation District No. 900 as the map of said subdivision appears of record in the office of the Recorder of Yolo County in Map Book 3 at page 75, and extending thence from said designated point of beginning and at right angles with said southeasterly line of said California State Highway right of way south 16 degrees 14' 30" east a distance of 400 feet to a point, thence south 73 degrees 50' west a distance of 125 feet more or less to a point; thence north 19 degrees 20' 30" west a distance of 404.89 feet to a point of intersection with the southeasterly line of the said California State Highway,

Yolo County route 6, section C right of way, thence along a curve to the left, having a radius of 2050 feet, a total deflection angle of 12 degrees 03' 30" and a total length of 641.90 feet, for a distance of 125 feet more or less along said southeasterly line of said route 6, section C right of way to the point of beginning.

II.

That on the first day of March, 1943, Capitol Chevrolet Company, a California corporation, as the agent, servant and employee of Defense Supplies Corporation, and upon its order, authorization, consent and instructions, entered into a lease dated March 1, 1943, between defendant Clyde W. Henry and C. Parella and Capitol Chevrolet Company, a California [19] corporation, wherein the aforementioned premises were leased for a period of one year, commencing on the first day of March, 1943, and terminating on the 29th day of February, 1944, for the total sum of $3,600.00, in installments of $300.00 payable on the 1st day of each and every calendar month.

That among the provisions of said written lease was the further provision that the lessee waives all claims for loss or injury arising out of theft, burglary, fire or loss of property, or injury to said property, or damage to said property occurring in the said leased premises or in or about said building, irrespective of how such damage is caused.

III.

That in truth and in fact Defense Supplies Cor-

poration was the undisclosed principal in the said lease, and Capitol Chevrolet Company, a California corporation, was merely the agent executing the said lease in its name and for and on behalf of the plaintiff, Defense Supplies Corporation.

IV.

Defendant further alleges that the execution of said lease for and on behalf of Defense Supplies Corporation, as a principal, in the name of Capitol Chevrolet Company, a California corporation, was ratified and approved in all of its terms, including the provision releasing the lessors from any and all claims for damages as aforesaid.

That by virtue of the provision in said lease as aforesaid, defendant Clyde W. Henry was released by the terms of said lease from liability for any damage purported to be claimed in said complaint.

As and for a separate, second and special defense to all [20] the cause of action contained in plaintiff's complaint on file herein, and to all the allegations contained in said First, Second, Third and Fourth Causes of Action, defendant Clyde W. Henry alleges as follows:

I.

Defendant Clyde W. Henry refers to, and realleges, all of the allegations set forth in his first special defense to the First, Second, Third and Fourth Causes of Action in plaintiff's complaint contained, and to all the allegations in said causes

of action contained, and by such reference incorporates the same herein as if fully set forth herein.

II.

That by virtue of the lease of March 1, 1943, entered into as aforesaid by Capitol Chevrolet Company, a California corporation, for and on behalf of plaintiff herein, plaintiff Defense Supplies Corporation has expressly waived its right to any claim for any damage against this defendant claimed in said complaint.

As and for a separate, third and special defense to all the causes of action contained in plaintiff's complaint, and to all the allegations contained in all the causes of action, defendant Clyde W. Henry alleges as follows:

I.

Defendant refers to and realleges all of the allegations set forth in his first special defense to all the causes of action in plaintiff's complaint contained, and to all the allegations in said causes of action contained, and by such reference incorporates the same herein as if fully set forth herein.

II.

That by virtue of the said lease of March 1, 1943 entered into as aforesaid by Capitol Chevrolet Company, a California corporation, for and on behalf of plaintiff herein, plaintiff has expressly waived its right to any claim for any damages against this defendant, and is hereby estopped from making

any demand for any damage alleged in its complaint.

Wherefore, defendant prays that plaintiff take nothing by its complaint, and that this defendant be hence dismissed with his costs incurred herein.

LOUIS J. GLICKSBERG,

Attorney for Defendant Clyde W. Henry.

State of California
City and County of San Francisco—ss.

Clyde W. Henry, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except for matters therein stated on information and belief, and that as to those matters he believes it to be true.

CLYDE W. HENRY

Subscribed and sworn to before me this 17th day of April, 1944.

(Seal) GEORGE B. GILLIN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 18, 1944. [22]

[Title of District Court and Cause.]

Interrogatory No. 1

1. When, and in what manner it is claimed by plaintiff that this defendant permitted the use of the acetylene torch on the premises referred to in the fourth cause of action of plaintiff's complaint herein.

Answer to Interrogatory No. 1

1. Answer to the first interrogatory, to-wit:

"When, and in what manner it is claimed by plaintiff that this defendant permitted the use of the acetylene torch on the premises referred to in the fourth cause of action of plaintiff's complaint herein."

As alleged in the complaint, defendant Lawrence Warehouse Company, permitted the use of said torch on said premises at the time the loss occurred, which was on or about April 9, 1943.

As alleged in the complaint, at the time the torch was used on said premises and the goods of plaintiff were destroyed, said goods were in the possession of defendant Lawrence Warehouse Company. Plaintiff is therefore unable to state exactly in what manner said defendant permitted the use of the torch on said premises. Plaintiff believes, however, that the employees of defendant employed by it to protect said premises, gave the workmen who used the torch, as alleged in the complaint, permission to enter upon the premises upon which the goods were stored.

Interrogatory No. 2

When and in what manner this defendant failed and omitted to see that said acetylene torch was used in a careful manner.

Answer to Interrogatory No. 2

2. Answer to the second interrogatory, to-wit:

"When and in what manner this defendant failed and omitted to see that said acetylene torch was used in a careful manner." [23]

As alleged in the complaint, defendant Lawrence Warehouse Company failed and omitted to see that said torch was used in a careful manner at the time the loss occurred, which was on or about April 9, 1943.

As alleged in the complaint, at the time the torch was used on the premises referred to therein and the goods of plaintiff were destroyed, said goods were in the possession of defendant, Lawrence Warehouse Company. Plaintiff is therefore unable to state exactly in what manner said defendant failed and omitted to see that said torch was used in a careful manner. Plaintiff believes, however, that said defendant and its employees failed and omitted to caution the workmen using the torch, as alleged in the complaint although the said defendant and its employees knew or should have known that under the circumstances the use of said torch was likely to ignite said premises and the goods stored therein.

Interrogatory No. 3

When and in what manner this defendant failed to provide adequate protection for the premises or goods referred to in said fourth cause of action against the use of said acetylene torch.

Answer to Interrogatory No. 3

3. Answer to the third interrogatory, to-wit:

"When and in what manner this defendant failed to provide adequate protection for the premises or goods referred to in said fourth cause of action against the use of said acetylene torch."

As alleged in the complaint, defendant Lawrence Warehouse Company failed to provide adequate protection for the premises and goods referred to therein, against the use of the said torch, at the time the loss occurred, which was on or about April 9, 1943. [24]

As alleged in the complaint at the time the loss occurred, the goods of plaintiff were in the possession of defendant, Lawrence Warehouse Company. Plaintiff is therefore unable to state exactly in what manner said defendant failed to provide adequate protection for said premises and said goods against the use of said torch. Plaintiff believes, however, that said defendant and its employees failed to see that the part of the said premises where the said torch was used was free of inflammable materials which were likely to become ignited if an acetylene torch was used thereon, and failed to provide adequate supplies and equipment for fighting fire;

such at water, hoses, fire extinguishers, etc., and failed to furnish sufficient guards and other protective services and was negligent in other respects not now within the knowledge of the plaintiff.

Interrogatory No. 4.

4. When and in what manner this defendant maintained the premises and/or the goods referred to in said fourth cause of action in a negligent and careless manner, or so as to permit them to become ignited and destroyed by fire.

Answer to Interrogatory No. 4.

4. Answer to the fourth interrogatory, to-wit:

"When and in what manner this defendant maintained the premises and/or the goods referred to in said fourth cause of action in a negligent and careless manner, or so as to permit them to become ignited and destroyed by fire."

As alleged in the complaint, defendant Lawrence Warehouse Company maintained the premises and the goods referred to therein in a negligent and careless manner at the time the loss occurred, which was on or about April 9, 1943.

As alleged in the complaint, at the time the loss occurred, the goods of plaintiff were in the possession of said defendant. Plaintiff is therefore unable to state exactly [25] in what manner said defendant maintained said premises and said goods in a negligent and careless manner, or so as to permit them to become ignited and destroyed by fire. Plaintiff

believes, however, that said defendant maintained said premises and said goods in such a manner in the respects states in the answer to the third interrogatory, and in other respects not now within the knowledge of plaintiff.

Interrogatory No. 5.

5. How and in what manner any act of negligence attributed by the plaintiff to this defendant concurred and joined with the acts of others in destroying plaintiff's goods as alleged in said fourth cause of action.

Answer to Interrogatory No. 5.

5. Answer to the fifth interrogatory, to-wit:

"How and in what manner any act of negligence attributed by the plaintiff to this defendant concurred and joined with the acts of others in destroying plaintiff's goods as alleged in said fourth cause of action."

Plaintiff believes that the fire which destroyed the goods was ignited by the torch referred to in the complaint and that the acts and omissions of defendant Lawrence Warehouse Company, as alleged in the complaint and in this answer to the interrogatories of said defendant directly resulted in the use of the said torch on the said premises by the other defendants in a negligent manner, and, therefore, the acts and omissions of defendant Lawrence Warehouse Company concurred with the acts of the other defendants in causing the fire which resulted in the destruction of plaintiff's goods.

Plaintiff also believes that defendant Lawrence Warehouse Company was negligent in permitting the use of an acetylene torch on the premises knowing that inflammable material was stored thereon whether said torch was used in a negligent manner or not. [26]

Interrogatory No. 6.

6. Whether the plaintiff maintained a watchman on or about the premises referred to in said complaint at the time of and prior to the time of the said fire on said premises on April 9, 1943.

Answer to Interrogatory No. 6.

6. Answer to the sixth interrogatory, to-wit:

"Whether the plaintiff maintained a watchman on or about the premises referred to in said complaint at the time of and prior to the time of the said fire on said premises on April 9, 1943."

Plaintiff did not maintain a watchman on or about said premises on or prior to April 9, 1943. In this connection plaintiff believes that guard service was contracted for and maintained by defendant Lawrence Warehouse Company or by defendant Capitol Chevrolet Company.

[Endorsed]: Interrogatories propounded to the Plaintiff. Filed April 21, 1944.

Answer to Interrogatories propounded to Plaintiff by Defendant Lawrence Warehouse Company. Filed May 12, 1944. [27]

[Title of District Court and Cause.]

ANSWER TO DEFENDANT J. V. McGREW

Comes now defendant, J. V. McGrew, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

Answer to First Cause of Action

I.

Answering the allegations in plaintiff's First Cause of Action contained, this defendant has no information or belief upon the allegations set forth in Paragraphs V and VI of said First Cause of Action sufficient to enable him to answer, and therefore denies each and every allegation therein contained.

Answer to Second Cause of Action

II.

Answering the allegations in plaintiff's Second Cause of Action contained, this defendant has no information or belief upon the allegations set forth in Paragraphs II and III of said Second Cause of Action, and therefore denies each and every allegation therein contained. [28]

Answer to Third Cause of Action

I.

Answering the allegations in plaintiff's Third Cause of Action contained, and specifically referring to Paragraph I of said Third Cause of Action, this answering defendant denies all the allegations con-

tained in Paragraph II of plaintiff's Second Cause of Action, which said paragraph plaintiff has incorporated in said Third Cause of Action.

II.

Answering the allegations contained in Paragraphs IV and V of said Third Cause of Action, this answering defendant denies each and every, all and singular, generally and specifically the allegations contained in said paragraphs.

Answer to Fourth Cause of Action

I.

Answering the allegation in plaintiff's Fourth Cause of Action contained, and specifically referring to Paragraph I of said Fourth Cause of Action, this answering defendant denies all the allegation contained in Paragraph II of plaintiff's Second Cause of Action, which said paragraph plaintiff has incorporated in said Fourth Cause of Action.

II.

Answering the allegations contained in Paragraphs II, III, IV and V of said Fourth Cause of Action, this answering defendant denies each and every, all and singular, generally and specifically the allegations in said paragraphs contained.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that this defendant be hence dismissed with its costs incurred herein.

ALBERT H. GOMMO, JR.,
Attorney for Defendant J. V. McGrew.

[29]

State of California,
City and County of San Francisco—ss.

Albert H. Gommo, Jr., being first duly sworn, deposes and says:

That he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and that as to those matters he believes it to be true; that affiant makes this affidavit on behalf of defendant, J. V. McGrew, as attorney for said defendant, for the reason that said defendant is absent from the City and County of San Francisco where affiant has his office.

ALBERT H. GOMMO, JR.

Subscribed and sworn to before me this 27th day of April, 1944.

[Seal] GEORGE B. GILLIN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 28, 1944. [30]

[Title of District Court and Cause.]

LAWRENCE WAREHOUSE COMPANY, a corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation,

Cross-Defendants.

AFFIDAVIT OF SERVICE BY MAIL

State of California,
City and County of San Francisco—ss.

Mary Walsh, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of eighteen, and competent to be a witness in the above matter. That on the 8th day of May, 1944, she served the within Answer of Defendant Lawrence Warehouse Company and Cross-Claim Against Certain Defendants upon Constantine Parella and Capitol Chevrolet Company, defendants and Cross-Defendants, by depositing a copy thereof in the United States Mails at San Francisco, California, postage prepaid, addressed to A. J. Getz, 714 West Olympic Boulevard, Los Angeles, California, attorneys for Capitol Chevrolet Company, and by likewise depositing a copy ad-

dressed to Evan J. Hughes, Attorney at Law, Sacramento, California, the attorney for Constantine Parella.

MARY WALSH

Subscribed and sworn to before me this 8th day of May, 1944.

[Seal] HAZEL E. THOMPSON,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires October 14, 1946.

[Endorsed]: Filed May 8, 1944. [32]

[Title of District Court and Cause.]

LAWRENCE WAREHOUSE COMPANY, a corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation,

Cross-Defendants.

ANSWER OF DEFENDANT LAWRENCE WAREHOUSE COMPANY AND CROSS-CLAIM AGAINST CERTAIN DEFENDANTS

Defendant Lawrence Warehouse Company, a corporation, makes this its answer to plaintiff's complaint herein.

Answering the first cause of action, this defendant admits, alleges and denies as follows:

I.

Admits the allegations contained in Paragraphs designated I, II, III and IV of said cause of action.

II.

This defendant has not sufficient knowledge, information or belief to enable it to answer the allegations contained in Paragraphs V and VI of said cause of action, and basing its answer on that ground, denies each and every the allegations in said paragraphs contained, except that this defendant specifically denies that this defendant and Capitol Chevrolet Company, or this defendant or *Capitol Company*, wrongfully and unlawfully, or wrongfully or unlawfully, or otherwise, or at all, converted to their own use and benefit, or to the use and benefit of either of them, all or any of said tires and tubes referred to in said first cause of action, or any tires or tubes, and this defendant admits that it has not paid to plaintiff the claimed sum of $76,000, or any thereof, but denies that the same, or any thereof, is due or owing to plaintiff.

Answer to Plaintiff's Second Cause of Action

For answer to plaintiff's second cause of action, this defendant admits, alleges and denies, as follows:

I.

Defendant repleads the matter contained in Paragraph I of its answer to the first cause of action

with the same force and effect as though the admissions therein were repeated at length herein. [34]

II.

Answering Paragraph II of plaintiff's second cause of action, this defendant alleges that prior to April 9, 1943, plaintiff, in pursuant of its desire to concentrate and store certain quantities of tires and tubes then being acquired by it, contracted with this defendant for storage of plaintiff's tires and tubes in the building known as the "Ice Palace", and located at West Sacramento, one mile west of the Sacramento River. For the purpose of carrying out its said agreement with plaintiff, this defendant entered into an agreement with defendant Capitol Chevrolet Company, under the terms of which said Capitol Chevrolet Company agreed to furnish suitable storage space for storage of plaintiff's tires and tubes, and to receive such tires and tubes as may be delivered to it, and to store and safeguard the same and to indemnify defendant against loss or damage resulting from the failure by said Capitol Chevrolet Company to perform any of the duties and obligations above mentioned; that plaintiff approved of the selection and employment of said Capitol Chevrolet Company by this defendant and approved of the said agreement between this defendant and said Capitol Chevrolet Company. For the purpose of storing therein tires and tubes belonging to the plaintiff, defendant Capitol Chevrolet Company rented the storage space in the said Ice Palace for the period of one year from March 1,

1943. The agreement of lease covering said premises was entered into by defendant Capitol Chevrolet Company only after plaintiff had inspected the said premises and the fire protection facilities available thereto, and approved the same, and in that behalf plaintiff agreed to the making of said lease in the name of said defendant Capitol Chevrolet Company, and also agreed to accept all [35] risks from loss or damage resulting from fire which might occur to its tires and tubes while stored in said premises. Incident to said storage and the rental of said premises, plaintiff directed that this defendant employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff. This defendant does not have sufficient knowledge, information or belief to enable it to answer the allegations of said Paragraph II as to the number of tires and tubes stored in said premises on April 9, 1943, nor as to the reasonable value thereof, and, therefore, basing its denial upon that ground, defendant denies that 27,601 tires and 1850 tubes were so stored, and also denies that the same or any tires and tubes so stored were of the reasonable value of $76,000.

III.

Answering Paragraph III of said second cause of action this defendant admits that on April 9, 1943, the said premises and all the tires and tubes

therein, including any tires and tubes of plaintiff, were consumed and totally destroyed by fire, but denies that the said fire or the resulting destruction of any tires or tubes so stored thereon, was due to any negligence, act or omission on the part of this defendant, and in that behalf, defendant avers that at all times and in all respects it exercised reasonable care and diligence for the protection and preservation of all tires and tubes of plaintiff stored in said premises, and denies that this defendant is liable for any damages whatever suffered by plaintiff. [36]

Answer to Plaintiff's Third Cause of Action

For answer to plaintiff's third cause of action, this defendant admits, alleges and denies, as follows:

I.

Defendant repleads the matter contained in Paragraph I of its answer to the first cause of action with the same force and effect as though said matter were repeated at length herein.

II.

This defendant has not sufficient knowledge, information or belief to enable it to answer the allegations contained in Paragraphs II and III of said third cause of action, and basing its denial upon that ground it denies each and every the said allegations.

III.

This defendant has not sufficient knowledge, information or belief to enable it to answer the allega-

tions contained in Paragraph IV of said third cause of action, and, therefore, basing its denial on that ground, it denies each and every, all and singular the allegations in said paragraph contained.

IV.

Answering Paragraph V of said third cause of action, this defendant denies that plaintiff was or is damaged in the sum of $76,000, or in any sum, by reason of any negligence, act or acts of this defendant.

Answer to Plaintiff's Fourth Cause of Action

For answer to plaintiff's fourth cause of action, this defendant admits, alleges and denies, as follows:

I.

Defendant repleads the matter contained in Paragraphs I and II of its answer to the third cause of action with the same force and effect as though said matter were repeated herein at length.

II.

This defendant has not sufficient knowledge, information or belief to enable it to answer the allegations contained in Paragraph II of said fourth cause of action, and basing its denial on that ground it denies each and every the allegations in said paragraph contained.

III.

This defendant denies generally and specifically, each and every allegation contained in Paragraph III of said fourth cause of action.

IV.

This defendant denies generally and specifically the allegations contained in Paragraph IV of plaintiff's fourth cause of action, and also denies that by reason of any act or any failure to act on the part of this defendant, or by reason of any negligence or want of diligence or care whatsoever on the part of this defendant, plaintiff has been damaged in the sum of $76,000, or in any other sum, and specifically denies that this defendant was guilty of any negligence or want of diligence or reasonable care in the premises.

For a Further, Separate and Affirmative Defense, this defendant assigns the following:

I.

That plaintiff's complaint does not, nor does any count thereof, state facts sufficient to constitute a cause [38] of action as against this defendant.

II.

That at all times mentioned in plaintiff's complaint, and at the time of the fire therein referred to, plaintiff maintained a watchman on the premises in which plaintiff's said tires and tubes were stored; that said watchman was under the direction and control of plaintiff and was so maintained to protect plaintiff's tires and tubes from loss or damage by fire and from theft, or other loss; that the operations referred to in Paragraph II of said fourth cause of action and the operations of the defendants named in said paragraph were carried on and con-

ducted without the knowledge or consent of this defendant, and that plaintiff at all said times, through its watchman, had full knowledge of and consented to the operations and activities referred to in said Paragraph II of plaintiff's fourth cause of action.

III.

That if any negligence on the part of any defendant either caused or contributed to the said fire on April 9, 1943, and to the consequent resulting loss claimed to have been suffered by plaintiff, plaintiff was guilty of contributory negligence in permitting and consenting to the use of the acetylene torch on or adjacent to the premises in which said tires and tubes were stored.

IV.

That at none of the times mentioned in plaintiff's complaint did this defendant have any relation with or control over the defendant, Clyde W. Henry, Constantine Parella, V. J. McGrew, Charles Elmore, or the, or any persons or corporations sued herein under fictitious names, and none of said defendants was employed by or an agent of, or authorized to act for this defendant. [39]

And for a further and separate answer and by way of cross-claim against the defendants, Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, this defendant and cross-claimant avers as follows:

I.

That on or about the 1st day of March, 1943,

cross-defendant Capitol Chevrolet Company entered into agreement of lease with cross-defendants Clyde W. Henry and Constantine Parella, whereby said cross defendants Henry and Parella leased and let, and cross-defendant Capitol Chevrolet Company hired certain premises known as the "Ice Palace" in West Sacramento, County of Yolo, State of California. It making said lease, said cross-defendant Capitol Chevrolet Company acted under the authority and direction of plaintiff, and only after plaintiff had inspected and approved the said premises and the fire protection facilities therein or available thereto, and it approved the same for the storage therein of tires and tubes belonging to plaintiff.

II.

This cross-claimant is informed and believes, and upon according to its information and belief alleges that on or about April 9, 1943, cross-defendants, Clyde W. Henry and Constantine Parella by and through their agents, servants and employees, and with the consent and approval of cross-defendant Capitol Chevrolet Company, entered the engine and boiler room then located in the building attached to the said Ice Palace, and then and there negligently and carelessly set fire to the said engine and boiler room, which fire immediately spread to and entirely consumed the Ice Palace and its contents.

III.

That at the time of the said fire, this cross-claimant had stored in the said Ice Palace tires and tubes

belonging to the plaintiff Defense Supplies Corporation, which said tires and tubes were in the custody and control of cross-defendant Capitol Chevrolet Company, pursuant to the terms and conditions of an agency agreement between this cross-claimant and said Capitol Chevrolet Company theretofore entered into with the approval and consent of the plaintiff Defense Supplies Corporation, and wherein said cross-defendant agreed to store and safeguard the storage of such tires and tubes as were received by it from this cross-claimant or plaintiff Defense Supplies Corporation, and to indemnify this cross-claimant against loss or damage to said tires and tubes.

IV.

This cross-claimant is informed and believes, and upon and according to its information and belief alleges that the said cross-defendants, through their agents, servants and employees, negligently and carelessly permitted the said fire, and as a direct result thereof the said Ice Palace and the said tires and tubes stored therein were wholly consumed and destroyed by fire.

V.

That plaintiff Defense Supplies Corporation claims and alleges that the reasonable value of the said tires and tubes so destroyed was $76,000, and has made demand upon this cross-claimant for the payment of the said sum of $76,000 by this cross-claimant on the ground that this cross-claimant was a bailee for the plaintiff Defense Supplies

Corporation and the custodian of said tires and tubes, [41]

Wherefore, defendant Lawrence Warehouse Company prays that plaintiff take nothing by this action against this defendant, and that this defendant be hence dismissed with its costs; and

If it shall be determined by judgment in this action that this defendant Lawrence Warehouse Company is liable in any manner or in any amount, that this defendant as cross-claimant may have and recover judgment against the cross-defendants Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, for the amount of any judgment which may be rendered in this action against defendant Lawrence Warehouse Company, together with any interest that may accrue upon said judgment until the same is paid; also, for costs of suit and such other and further relief as may be proper in the premises

W. F. WILLIAMSON,
W. R. WALLACE, JR.,
WILLIAMSON & WALLACE,
Attorneys for defendant and cross-claimant, Lawrence Warehouse Company, a corporation. [42]

State of California,
City and County of San Francisco—ss.

Clyde Hildreth, being first duly sworn, deposes and says:

That he is an officer, to-wit, Secretary of Lawrence Warehouse Company, a corporation, a defendant in the above entitled action; that he has read the foregoing Answer of Defendant Lawrence Warehouse Company and Cross-Claim Against Certain Defendants and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

CLYDE HILDRETH.

Subscribed and sworn to before me this 8th day of May, 1944.

HAZEL E. THOMPSON,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires October 14, 1946.

Receipt of copy of the within admitted this 8th day of May, 1944.

THEODORE R. MEYER,
BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

Receipt of copy of the within admitted this 8th day of May, 1944.

LOUIS J. GLICKSBERG.
Attorney for Clyde W. Henry.

[Title of District Court and Cause.]

LAWRENCE WAREHOUSE COMPANY, a Corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a Corporation,

Cross-Defendants.

ANSWER OF CROSS-DEFENDANT CLYDE W. HENRY

Comes now cross-defendant Clyde W. Henry and answering the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, admits, denies and alleges as follows:

I.

Answering Paragraph I of said cross-complaint this answering cross-defendant admits that a lease was entered into on the 1st day of March, 1943, between, cross-defendant [44] Capitol Chevrolet Company and cross-defendants Clyde W. Henry and Constantine Parella, whereby cross-defendants Henry and Parella leased and rented, and cross-defendant Capitol Chevrolet Company hired the premises known as the "Ice Palace" in West Sacramento, County of Yolo, State of California.

II.

Answering the allegations contained in Paragraph

II of said cross-complaint, this cross-defendant denies each and every, all and singular the allegations in said paragraph contained.

III.

Answering the allegations contained in Paragraph III of said cross-complaint, cross-defendant Clyde W. Henry has not sufficient knowledge, information or belief to enable him to answer the allegations of said paragraph, and basing his answer on that ground, denies each and every allegation in said Paragraph III contained.

IV.

Answering the allegations of Paragraph IV in said cross-complaint contained, this answering cross-defendant denies each and every allegation of said paragraph.

V.

Answering the allegations contained in Paragraph V of said cross-complaint, this cross-defendant has not sufficient knowledge, information or belief to enable him to answer the allegations of said paragraph, and basing his answer on that ground, denies each and every allegation in said Paragraph V contained.

As a separate, second and special defense to said cross-complaint, cross-defendant Clyde W. Henry alleges as [45] follows:

I.

That on or about the 1st day of March, 1943,

cross-defendants Clyde W. Henry and Constantine Parella were the owners of certain real estate in the County of Yolo, State of California, which property is more particularly described as follows:

Beginning at a point in the southeasterly line of the California State Highway right of way that extends between Sacramento and Davis and designated as Yolo County, route 6, section C, said point of beginning being situate north 85 degrees, 49 minutes east 1045.47 feet and thence north 73 degrees 45' 30" east 275 feet from the point of intersection of the southerly line of the right of way of said route 6, section C with the center line of the State Highway that extends southerly along the east line of Westacres Subdivision in Reclamation District No. 900 as the map of said subdivision appears of record in the office of the Recorder of Yolo County in Map Book 3 at page 75, and extending thence from said designated point of beginning and at right angles with said southeasterly line of said California State Highway right of way south 16 degrees 14' 30" east a distance of 400 feet to a point, thence south 73 degrees 50' west a distance of 125 feet more or less to a point; thence north 19 degrees 20' 30" west a distance of 404.89 feet to a point of intersection with the southeasterly line of the said California State Highway, Yolo County route 6, section C right of way, thence along a curve to the left, having a radius of 2050 feet, a total deflection angle of 12 degrees 03' 30" and a total length of 641.90 feet, for a distance of 125 feet more or less along said southeasterly line of said

route 6, section C right of way to the point of beginning:

II.

That on the 1st day of March, 1943, Capitol Chevrolet Company, a California corporation, as the agent, servant and employee of Lawrence Warehouse Company, a corporation, and upon its order, authorization, consent and instructions, entered into a lease dated March 1, 1943, between cross-defendants Clyde W. Henry and Constantine Parella and cross-defendant Capitol Chevrolet Company, a California corporation, wherein the aforementioned premises were leased for a period of one year, commencing on the 1st day of March, 1943, and [46] terminating on the 29th day of February, 1944, for the total sum of $3,600, in installments of $300 payable on the 1st day of each and every calendar month.

That among the provisions of said written lease was the further provision that the lessee waives all claims for loss or injury arising out of theft, burglary, fire or loss of property, or injury to said property, or damage to said property occurring in the said leased premises or in or about said building, irrespective of how such damage is caused.

That by virtue of the provision in said lease aforesaid, cross-defendant Clyde W. Henry was released by the terms of said lease from liability for any damage purported to be claimed in said cross-complaint.

Wherefore, cross-defendant Clyde W. Henry

prays that Lawrence Warehouse Company, a corporation, cross-claimant herein, take nothing by its cross-complaint, and that this cross-defendant be hence dismissed with his costs incurred herein.

LOUIS J. GLICKSBERG,
Attorney for Cross-Defendant Clyde W. Henry.

State of California,
City and County of San Francisco—ss.

Louis J. Glicksberg, being first duly sworn, deposes and says: That he has read the foregoing Answer of Cross-Defendant Clyde W. Henry, and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and that as to those matters he believes it to be true; that affiant makes his affidavit on behalf of cross-defendant Clyde W. [47] Henry, as attorney for said cross-defendant, for the reason that said cross-defendant is absent from the City and County of San Francisco where affiant has his office.

LOUIS J. GLICKSBERG.

Subscribed and sworn to before me this 15th day of May, 1944.

[Seal] GEORGE B. GELLIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 19, 1944. [48]

[Title of District Court and Cause.]

CAPITOL CHEVROLET COMPANY, a Corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA,

Cross-Defendants.

ANSWER OF CROSS-DEFENDANT CLYDE W. HENRY

Comes now cross-defendant Clyde W. Henry and answering the cross-complaint of Capitol Chevrolet Company, a corporation, on file herein, admits denies and alleges as follows:

I.

Answering Paragraph I of said cross-complaint this answering cross-defendant admits that a lease was entered into on the 1st day of March, 1943, between cross-claimant Capitol Chevrolet Company and cross-defendants Clyde W. Henry and Constantine Parella, whereby cross-defendants Henry and [49] Parella leased and rented, and cross-claimant Capitol Chevrolet Company hired the premises known as the "Ice Palace" in West Sacramento, County of Yolo, State of California.

II.

Answering the allegations of Paragraphs II of said cross-complaint, this answering cross-defend-

ant denies each and every, all and singular the allegations in said paragraph contained.

III.

Answering the allegations of Paragraph III in said cross-complaint contained, this cross-defendant has not sufficient knowledge, information or belief to enable him to answer the allegations of said paragraph, and basing his answer on that ground denies each and every allegation in said Paragraph III contained.

IV.

Answering the allegations of Paragraph IV of said cross-complaint, cross-defendant Clyde W. Henry denies each and every, all and singular the allegations in said paragraph contained.

V.

Answering the allegations of Paragraph V in said cross-complaint contained, this cross-defendant has not sufficient knowledge, information or belief to enable him to answer the allegations of said paragraph, and basing his answer on that ground denies each and every allegation in said Paragraph V contained.

As a separate, second and special defense to said cross-complaint of Capitol Chevrolet Company, a corporation, cross-claimant herein, cross-defendant Clyde W. Henry alleges as follows:

I.

That on or about the 1st day of March, 1943,

cross-defendants [50] Clyde W. Henry and Constantine Patella were the owners of certain real property in the County of Yolo, State of California, which property is more particularly described as follows:

Beginning at a point in the southeasterly line of the California State Highway right of way that extends between Sacramento and Davis and designated as Yolo, route 6, section C, said point of beginning being situate north 85 degrees, 49 minutes east 1045.47 feet and thence north 73 degrees 45' 30" east 275 feet from the point of intersection of the southerly line of the right of way of said route 6, section C with the center line of the State Highway that extends southerly along the east line of Westacres Subdivision in Reclamation District No. 900 as the map of said subdivision appears of record in the office of the Recorder of Yolo County in Map Book 3 at page 75, and extending thence from said designated point of beginning and at right angles with said southeasterly line of said California State Highway right of way south 16 degrees 14' 30" east a distance of 400 feet to a point, thence south 73 degrees 50' west a distance of 125 feet more or less to a point; thence north 19 degrees 20' 30" west a distance of 404.89 feet to a point of intersection with the southeasterly line of the said California State Highway, Yolo County route 6, section C right of way, thence along a curve to the left, having a radius of 2050 feet, a total deflection angle of 12 degrees 03' 30" and a total length of 641.90 feet, for a distance of 125 feet more or less

along said southeasterly line of said route 6, section C right of way to the point of beginning.

II.

That on the 1st day of March, 1943, cross-claimant Capitol Chevrolet Company, a corporation, as the agent, servant and employee of Lawrence Warehouse Company, a corporation, and upon its order, authorization, consent and instruction, entered into a lease dated March 1, 1943, between cross-defendants Clyde W. Henry and Constantine Parella, and cross-claimant Capitol Chevrolet Company, a corporation, wherein the aforementioned premises were leased for a period of one year, commencing on the 1st day of March, 1943, and terminating on the 29th day of February, 1944, for the total sum of $3,600, in installments of $300 payable on the 1st day of each and every calendar month.

That among the provisions of said written lease was the further provision that the lessee waives all claims for loss or injury arising out of theft, burglary, fire or loss of property or injury to said property, or damage to said property occurring in the said leased premises or in or about said building irrespective of how such damage is caused.

That by virtue of the provision in said lease as aforesaid, cross-defendant Clyde W. Henry was released by the terms of said lease from liability for any damage purported to be claimed in said cross-complaint.

Wherefore, cross-defendant Clyde W. Henry

prays that cross-claimant Capitol Chevrolet Company, a corporation, take nothing by its cross-complaint, and that this cross-defendant be hence dismissed with his costs incurred herein.

LOUIS J. GLICKSBERG,
Attorney for Cross-Defendant
Clyde W. Henry.

State of California,
City and County of San Francisco—ss.

Louis J. Glicksberg, being first duly sworn, deposes and says: That he has read the foregoing Answer of Cross-Defendant Clyde W. Henry, and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and that as to those matters he believed it to be true; that affiant makes his affidavit on behalf of cross-defendant Clyde W. Henry, as attorney for said cross-defendant, for the reason that said cross-defendant is absent from the City and County of San Francisco where affiant has his office.

LOUIS J. GLICKSBERG.

Subscribed and sworn to before me this 15th day of May, 1944.

GEORGE B. GELLIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 19, 1944. [52]

[Title of District Court and Cause.]

At a Stated Term of the Southern Division of the the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 13th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable Louis E. Goodman, District Judge.

TRIAL.

This case came on regularly this day for trial before the Court sitting without a jury. Counsel appeared on behalf of certain parties as follows: R. L. Miller, Esq., and David E. Lombardi, Esq., for Defense Supplies Corporation; W. R. Wallace, Jr., Esq., and W. R. Ray, Esq., for defendant Lawrence Warehouse Company; Evan C. Hughes, Esq., for Constantine Parella; A. J. Getz, Esq., for Capitol Chevrolet Company; Louis Glicksberg, Esq., for Clyde W. Henry and Charles Elmore, and A. E. Gommo, Esq., for V. J. McGrew. On motion of Mr. Wallace, it is Ordered that Mr. Getz be admitted to practice before this Court for the purposes of this case only. Thereupon the case proceeded to trial. Mr. Miller made a statement to the Court. Alfred D. McClellan, Clyde W. Henry, Gordon Kenyon, and James A. Kenyon were sworn and testified on behalf of the plaintiff. Mr. Miller introduced and filed in evidence Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. Mr. Wallace introduced Defendant's Exhibit A for

identification. The hour for adjournment having arrived, it is Ordered that the further trial of this case be continued to February 14, 1945, at 10:00 a. m.

[Title of District Court and Cause.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable Louis E. Goldman, District Judge.

TRIAL RESUMED—EVIDENCE INTRODUCED—ORDERED DISMISSALS AS TO CONTANTINE PARELLA & CHARLES ELMORE.

The parties hereto being present as heretofore, trial of this case was resumed. William G. Hanley, V. J. McGrew, Leo Johnson, and W. R. Kissel were sworn and testified on behalf of the plaintiff. Alfred D. McClellan was recalled for further cross-examination. Mr. Lombardi introduced and filed in evidence Plaintiff's Exhibits Nos. 13 and 14, and the plaintiff rested. Mr. Getz introduced and filed in evidence Defendant's Exhibit B. Mr. Hughes made a motion to dismiss the defendant Constantine

Parella. There being no objection, it is Ordered that Constantine Parella be dismissed. Mr. Glicksberg made a motion to dismiss the complaint as to Charles Elmore. There being no objection, it is Ordered that the complaint be dismissed as to Charles Elmore. Mr. Wallace made a motion to dismiss the complaint as to Lawrence Warehouse Co. The hour of adjournment having arrived, it is Ordered that the further trial of this case and the hearing on the motion to dismiss as to Lawrence Warehouse Co. be continued to February 15, 1946, at 10:00 a. m.

[Title of District Court and Cause.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 15th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable Louis E. Goldman, District Judge.

TRIAL RESUMED—ORDERED MOTIONS TO DISMISS AS TO CAPITOL CHEVROLET COMPANY, CLYDE HENRY & V. J. McGREW BE SUBMITTED.

The parties hereto being present as heretofore, trial of this case was resumed. Mr. Getz made a motion for dismissal as to Capitol Chevrolet Co.,

Mr. Glicksberg made a motion to dismiss as to Clyde Henry. Mr. Gommo made a motion to dismiss as to V. J. McGrew. After hearing arguments, on the motions, of Mr. Getz, Mr. Wallace, Mr. Glicksberg, Mr. Gommo, and Mr. Miller, the defendants rested. After hearing the attorneys, it is Ordered that the motions to dismiss and the cause be submitted to the Court for consideration and decision on memorandums to be filed in 30, 30, and 5 days, and that the case be continued to May 1, 1945, for submission.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

In 1943, plaintiff, a corporate agency of the United States created pursuant to the authority contained in Section 5d of the Reconstruction Finance Corporation Act as amended by Act of June 25, 1940, initiated and prosecuted a plan known as the "Idle Tire Purchase Plan." Its purpose was to create a stock pile of used and spare automobile tires in aid of the national defense. On March 1, 1943, having accumulated a quantity of tires and tubes in Sacramento, California, plaintiff contracted with defendant Lawrence Warehouse Company, a corporation engaged in the warehousing business, to store and safekeep the same. Defendant, Lawrence Warehouse Company, with the consent and approval of plaintiff, in turn contracted with de-

fendant Chevrolet Company to warehouse the tires and tubes as its agent. Previously defendant Capitol Chevrolet Company had leased from defendant Clyde W. Henry a building formerly used as an ice skating rink, in the outskirts of Sacramento, California, and the tires and tubes were stored therein. On April 9, 1943, defendant V. J. McGrew, a well drilling contractor, who was elsewhere drilling a well for defendant Henry, entered the building where the tires and tubes were stored and by use of acetylene torch proceeded to cut up a steel tank in the engine room of the warehouse. In the course of his work, [57] a fire started in the engine room and the building and all the tires and tubes were destroyed by fire.

By this suit plaintiff seeks to recover the value of the tubes and tires destroyed. The question presented is whether any or all or which of defendants is liable for the loss.

Defendant Lawrence Warehouse Company cross-complained against defendants Capitol Chevrolet Company and Henry wherein it sought judgment against the named cross-defendants in the event of an award against it in favor of plaintiff. Likewise defendant Capitol Chevrolet Company cross-complained against defendant Henry seeking like relief against him. After plaintiff concluded its evidence, defendants moved to dismiss and for judgment in their favor. After argument it was stipulated, (the defendants not desiring to submit any evidence on their behalf) that the cause might be submitted

upon the motions to dismiss. No evidence was presented in support of the cross-complaints and the issues there raised are not now before the court for adjudication.

THE CASE AGAINST DEFENDANT McGREW

The evidence discloses the following facts as to the starting of the fire: The engine room, which was approximately 25 by 40 feet in size, although a separate room with three wooden walls, was part of the main building. In the engine room was a steel tank resting on wooden blocks. McGrew did not examine the floor. There is evidence of some undescribed "dark" substance on the floor beneath the tank. While McGrew was using the torch to cut the tank, the fire started. At the time, a fairly strong northwest wind was blowing and the door on the west side of the room as well as the windows of the room were open. There is [58] evidence of admission by McGrew that "it looked as if the fire started where I was cutting the tank." (Tr. 177).

It is contended by defendant McGrew that the evidence does not justify a finding that his use of the torch started the fire and that such conclusion is purely conjectural. I am fully convinced by the evidence that McGrew caused the fire by his use of the torch and that he failed to take reasonable precautionary measures against fire and neglected to properly inspect the premises before commencing and while performing his work. I do not feel bound to follow the cited case of Bartholomai v. Owl Drug

Co. 42 Cal. App. (2d) 38, inasmuch as it fails to recognize the existence of a duty upon the part of a person using an instrumentality capable of igniting combustible material to ascertain the presence of such material nearby and to safeguard against its ignition. The case of Wilson v. Southern Pacific R. R. Co. 62 Cal. 164 appears to me to be in point and persuasive against defendant's contention.

THE CASE AGAINST DEFENDANT HENRY

It is sought to fix liability upon the landlord Henry upon the following grounds: (1) that McGrew was at the time of the fire acting as his agent; (2) that, conceding an independent contract relationship between the two men, the work being done on the premises was inherently dangerous and therefore the duty of exercising due care could not be delegated to McGrew; hence Henry is liable as if McGrew were his agent; (3) that Henry had an independent nondelegable duty as landlord to use due care to avoid injury to the property of a tenant or of those privy to the tenant, and is liable for injuries resulting from a violation of such duty. [59]

The contention that McGrew was Henry's agent is not sustained by the evidence. McGrew was a contractor. He agreed to drill a well for Henry, supplying his time and the necessary labor and equipment at an hourly rate of compensation. Henry paid for the material which was supplied by McGrew. Henry had no manner of control over McGrew's operations. It is true that Henry gave

permission to McGrew to use the steel in the tank (which belonged to Henry) in the well drilling operation. It is also true that Henry, through an employee, obtained the necessary authority for McGrew to enter the premises to get the steel in the tank. No instructions or directions were given or caused to be given by Henry to McGrew as to the manner or mode of obtaining the steel. In effect what he did was to give permission to McGrew to use the tank, if it was serviceable in drilling the well, and to obtain authority for him to go upon the premises. Therefore, while a benefit accrued to Henry in that the material was useful in completing the well, likewise McGrew was benefited for it enabled him to proceed under his contract. Judged by well and long established criteria, the relationship between the two men rested upon independent contract and not upon agency. Hillen v. Ind. Comm. 199 Cal. 577; § 8b California Workmen's Compensation Act § 3353 California Labor Code. See Teller v. Bay & River Dredging Co. 151 Cal. 209 for a strongly analogous case on the facts. Id. Eads v. St. Louis I. M. & S. Ry. 167 S. W. 577; Klee v. U. S. 9 Cir. 53 Fed. (2d) 58.

The contention that an inherently dangerous procedure in the execution of the independent contract fastened liability upon Henry for the negligence of the contractor McGrew is likewise not substantiated in the record. It does not appear that Henry in fact knew of the contemplated method of [60] procedure of McGrew or, by reason of any custom

theretofore existing in their relationship, should have known thereof. Absent these factors, the basis of liability is not present. Seattle Lighting Co. v. Hawlet, 54 Wash. 137, 103 Pac. 6. See cases collected in 23 ALR 1084.

Likewise the claim that landlord Henry is liable for violation of non-delegable duty to use due care for the protection of his tenants' property has no evidentiary basis. This contention fails because the facts disclosed that Henry was not acting in his capacity as landlord in obtaining permission for McGrew to enter the premises to get the steel, but rather in furtherance of an entirely separate enterprise, co-incidental it is true, but completely disassociated from the landlord tenant relationship. Hence the duty which gives rise to the liability was non-existent. Firestone v. Schoenberger 28 Ohio N. P. 436.

I conclude that no legal basis for liability of defendant Henry is here present.

THE CASE AGAINST CAPITOL CHEVROLET COMPANY AND LAWRENCE WAREHOUSE COMPANY

The nature and extent of the liability of Lawrence Warehouse Company is fixed in paragraph II of its contract with plaintiff (Plaintiff's Ex. 1) which provides:

"Your general responsibility for the care and protection of the tires will be limited to such care

as is required by laws governing warehouse in your state and to the exercise of ordinary care on your part."

If Capitol Chevrolet Company, the agent of Lawrence Warehouse Company (Plaintiff's Ex. 11) failed to use reasonable care for the preservation of plaintiff's goods [61] whereby the damage was caused or contributed to, Lawrence Warehouse Company is liable to plaintiff. California Warehouse Receipt Act, Sec. 21, California Civil Code, Sec. 1858e. Since the cause itself was submitted after the conclusion of plaintiff's evidence, it is to that evidence the court must look in order to determine liability.

Plaintiff contends that a prima facie case of liability is established against the warehousemen by proof of the bailment plus loss due to fire in the bailee's premises. Contrariwise, Lawrence Warehouse Company asserts the legal insufficiency of such a showing claiming that in this action, predicated and tried, as it was, on the theory of negligence, the burden is on the plaintiff to show that the warehousemen's negligence caused or contributed to cause the fire. But the liability of the warehousemen here does not depend at all upon the quantum of evidence required to establish a prima facie case of liability against a bailee for loss by fire of goods intrusted to its care, an issue as to which both sides have extensively labored with the

aid of many citations. [1]The liability of the warehousemen here depends upon the answer to the following query:

Does it appear, from a preponderance of the evidence, that defendant warehouseman failed to take reasonable precautions for the prevention of fire and for its extinguishment [62] after it occurred, thereby causing or contributing to the plaintiff's loss?

That the foregoing query is predicated upon a proper legal standard is substantiated by respectable precedents. Lake Union Drydock & Machine Works v. U. S. 9 Cir. 79 Fed. (2d) 802: Dieterle v. Bekin 143 Cal. 683, 687; Runkle v. Southern Pacific Milling Co. 184 Cal. 714; England v. Lyon Fireproof Storage Co. 94 Cal. App. 562.

In my opinion, the evidence fully justifies the inference[2] that Capitol Chevrolet Company failed to take reasonable precautions which proximately

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[1]The so-called "prima facie" rule does not prevail in this circuit upon motion to dismiss in non jury cases after conclusion of plaintiff's evidence. The adjudication of the court in such a case is upon the merits after weighing the evidence according to the appropriate standards. Rule 41bs Rules of Civil Procedure. Barr v. Equitable Life Assur. Soc. 9 Cir. 149 Fed. (2d) 634. See also Comment in 9 Fed. Rules Service p. 37.

[2]Direct and positive evidence is not prerequisite in this kind of case. See Wilson v. Southern Pacific Co. supra.

contributed to the fire loss. Upon the defendant warehousemen rested the duty of anticipating fire hazards and maintaining proper and preventive lookouts. This is patently obvious when, as here, they stored valuable inflammable material in a wooden structure in a semi-rural area, outside the city limits and too far beyond speedy access of fire fighting equipment.

Furthermore the evidence discloses that Capitol Chevrolet Company failed to have anyone at the warehouse premises to keep a lookout for possible fires or fire hazards and to do whatever was reasonably required to guard against such occurrences. No inquiry was made when McGrew was permitted to enter the premises, as to his intentions and mode of procedure. Nor did Capitol Chevrolet Company ascertain, after McGrew's entrance, what he was actually doing, although at the time of the fire, he had already been using the torch the day previous and during the morning of the day of the fire. This despite the fact that his torch and welding equipment were in plain sight outside the engine room. Also it appears [63] that there was no fire fighting equipment available at the premises with which a fire, such as the one McGrew started, could have been combated.

The warehousemen are not relieved of the duty to exercise due care for the prevention of fires, upon the ground, as urged, that they could not reasonably have anticipated the acts of McGrew. At best, McGrew's acts were a concurring cause

and cannot relieve the warehousemen of liability so long as their own negligence contributed to the loss or damage. Taylor v. Oakland Scavenger Co. 17 Cal. (2d) 594, 602.

It is contended that Lawrence Warehouse Company stands acquitted of liability because the plaintiff inspected and approved the use of the premises as a warehouse, approved the agency contract with Capitol Chevrolet Company, designated the persons, including Henry, to be allowed access to the premises and selected and employed an independent detective agency to provide a 24 hour armed guard service.[1] But by none of the foregoing acts was Lawrence Warehouse Company absolved of its legal and contractual obligation as warehousemen to protect plaintiff's property from risk of loss by fire. Nor was Lawrence Warehouse Company relieved of its duty by plaintiff's approval or selection of Capitol Chevrolet Company as agent of Lawrence Warehouse Company for the latter was under no compulsion to contract as it did with plaintiff. Having done so, it is bound thereby.

There remains to be determined whether there is direct liability of Capitol Chevrolet Company to plaintiff. It [64] cannot be disputed that Capitol Chevrolet Company accepted the tires for storage. Thereby it became a bailee for hire for the benefit of plaintiff. And there then rested upon it the

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[1]The evidence indicates that the armed guard service was purely an additional and independent protective activity to prevent pilferage of the tires.

legal duty toward the plaintiff to use due care for the preservation of plaintiff's property. California Civil Code § 1814, Lough v. John Davis Co. 30 Wash. 204, 70 Pac. 491; E. N. Emery & Co. v. Amer. Refrigerator Transit Co. 194 Iowa 926, 189 N. W. 824; Orcutt v. Century Building Co. 201 Mo. 424, 99 S. W. 1062; Franklin v. May Department Stores, 25 Fed. Supp. 735.

Capitol Chevrolet Company is not excused because its principal is liable, for it is its statutory and common law duty as well as its contract obligation which subjects it to liability. California Civil Code, Sections 1814, 1851, 1852. Mayer v. Thompson Hutchinson Bldg. Co. 104 ALa. 611, 16 So. 620.

THE AMOUNT OF THE LOSS

The amount of damage alleged by plaintiff is $76,000.00. The basis upon which its calculation of the value of the graded tires and tubes destroyed is made,—namely, average cost, not of the destroyed graded tires and tubes, but of all such tires and tubes collected by plaintiff in Northern California, —I find to be speculative and therefore legally improper. Muldrow v. Samuel Norris, 2 Cal. 74.

However mere uncertainty in amount is not an obstacle to the allowance of damages. In the case of uncertainty, the most reasonable basis within the boundaries of possibility should be formulated. Pac. Steam Whaling Co. v. Alaska Packers Association, 138 Cal. 632; Hanlon D. & S. Co. v. Southern Pac.

Co. 92 Cal. App 230, 235; Story Parchment Co. v. Paterson, 282 U. S. 555; Eastman Co. v. Sc. Photo Co. 273 U. S 359; Rilovich v. Raymond, 20 Cal. App. (2d) 630. [65]

The testimony of Alfred D. McClellan (Tr. 14) and the data contained in plaintiff's Exhibit #3 show the following to be the number and classification of the tires and tubes destroyed:

	Quantity			Value
Scrap tires	13,412	@	$ .20 each	$ 2,682.40
Graded tires	14,189	@	2.75 each	39,019.75
Graded tubes	50	@	1.50 each	75.00
Scrap tubes	1,800	@	.11 each	198.00
Total				$41,975.15

The fair value, I have set out opposite the respective items. The manner of arriving at the value so fixed is set out in the margin.[1]

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[1]Graded Tires.

The record (Tr. 22; plaintiff's Exhibit #4, Grade 4) shows that the lowest OPA price for graded tires was $2.75 per tires. (By plaintiff's unacceptable theory of average cost a value of $3.48 per tire was claimed. (Tr. 23) The price of $2.75 does not in fact represent the lowest price paid by plaintiff for any graded tires, inasmuch as there was deducted from the OPA price on graded used tires 90c for each vulcanized spot repair needed and $1.70 for each reinforcement or sectional repair needed. (Plaintiff's Exhibit #4, Grade 4.) Since it is not unreasonable to assume that tire owners turned in under the "Idle Tire Purchase Plan" their poorest tires, many of such graded used tires must have been purchased by plaintiff at less than $2.75, thus serving to offset to some degree other tires pur-

Judgment will enter in favor of plaintiff against defendants Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew for $41,975.15 and costs and in favor of defendant Henry and against plaintiff for costs. Findings will be submitted pursuant to the rules. The court will retain jurisdiction to determine the issues of the cross-actions, if the parties therein concerned determine to pursue the same.

Dated: January 9, 1946.

[Endorsed]: Filed Jan. 9, 1946. [67]

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chased for more than $2.75. These factors would in my opinion reasonably tend to equalize the difference in price to such an extent that a value of $2.75 per tire may be fixed as a fair and reasonable value of the graded tires destroyed.

Scrap Tires.

No difficulty presents itself as to scrap tires, since plaintiff paid 20c each for all tires of this kind.

Graded Tubes.

Likewise appraisement of value here is free of difficulty for the reason that the lowest OPA price for a sound or repaired used tube was $1.50. (Plaintiff's Exhibit #4, Table VI). Coincidentally this is average cost per plaintiff's theory.

Scrap Tubes.

There is evidence neither of any OPA price scrap tubes nor of the price paid by plaintiff, but plaintiff claims a value of 20c each. Since graded tubes appear to carry a value of 55% of the value of graded tires, it is fair reasonable to conclude that a similar ration of value obtained in the case of scrap tires and tubes. Consequently the value of the scrap tubes is fixed at 11c each.

District Court of the United States
Northern District of California
Southern Division

No. 23171-G—Civil

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 9th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman, District Judge.

DEFENSE SUPPLIES CORPORATION,

vs.

LAWRENCE WAREHOUSE COMPANY, ETC., et al.

JUDGMENT

Ordered that judgment enter in favor of plaintiff and against defendants Lawrence Warehouse Company, Capitol Chevrolet Company, and V. J. McGrew for $41,975.15 and costs, and in favor of defendant Henry against plaintiff for costs. [68]

[Title of District Court and Cause.]

ORDER SETTLING FINDINGS

As stated in the Court's opinion, the court regards plaintiff's approval of the premises as a place of storage to be immaterial on the question if the warehouseman's liability, but, at the request of defendants does find that "said warehouse known as the "Ice Palace" was leased by defendant Capitol Chevrolet Company from Clyde W. Henry and Constantine Parella for use as a warehouse for the storage of tires, after inspection of said "Ice Palace" by plaintiff prior to said lease and with the consent, approval and authorization of plaintiff for the leasing of said premises and their use for the storage of tires and tubes."

Let the findings be engrossed accordingly.

Dated: April 2, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed April 3, 1946.

[Title of District Court and Cause.]

FINDING OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 13th, 14th, and 15th day of February, 1945, before the court sitting without a jury, R. L. Miller, David E. Lombardi and Brobeck, Phleger

& Harrison appearing for plaintiff Defense Supplies Corporation; W. R. Wallace, Jr., W. R. Ray and Williamson & Wallace appearing for defendant Lawrence Warehouse Company; A. J. Getz appearing for defendant Capitol Chevrolet Company; Louis J. Glicksberg appearing for defendant Clyde W. Henry and defendant Charles Elmore; Evan J. Hughes appearing for defendant Constantine Parella; and [70] Albert H. Gommo, Jr. appearing for defendant V. J. McGrew.

Evidence both oral and documentary having been introduced, each of the defendants moved to dismiss the action; and the motions of defendants Constantine Parella and Charles Elmore were granted. The motions of defendants Lawrence Warehouse Company, Capitol Chevrolet Company, Clyde W. Henry and V. J. McGrew having been submitted for decision, said defendants having stated to the court that they did not wish to introduce further evidence, the court now makes its findings of fact as follows:

Findings of Fact

I.

All of the allegations of paragraphs I, II, III and IV of the plaintiff's first cause of action are true.

II.

Prior to April 9, 1943, plaintiff delivered to defendant Lawrence Warehouse Company and to defendant Capitol Chevrolet Company, the agent of defendant Lawrence Warehouse Company, who were

then and there doing a general storage and warehouse business, at their warehouse known as the "Ice Palace" in West Sacramento, California, certain quantities of tires and tubes, to-wit, 27,601 tires and 1,850 tubes, for storage and safekeeping. Said defendants agreed to and did receive possession of said goods for said purpose and plaintiff agreed to pay said defendants their storage charges for storing and keeping said goods, which said charges have been fully paid by plaintiff to said defendants. Plaintiff at all times mentioned in its complaint herein was the owner of said tires and tubes and entitled to their immediate possession, and said tires and tubes were on April 9, 1943 of the value of said reasonably worth the sum of $41,975.15. [71]

III.

On April 9, 1943, defendant V. J. McGrew negligently and carelessly caused an acetylene torch to be used on the premises in which plaintiff's said goods were stored, as aforesaid, and used and operated said torch on said premises in a negligent and careless manner. By reason of such negligence and carelessness said torch set fire to said premises and caused the same, together with its contents, including plaintiff's said goods, to be consumed and totally destroyed by fire.

IV.

Said acetylene torch was used and operated by defendant V. J. McGrew, as aforesaid, to cut a steel tank located on the premises in which plaintiff's said goods were stored. Said premises were at all

times herein mentioned owned by Clyde W. Henry and Constantine Parella, and the said tank was at all times herein mentioned owned by defendant, Clyde W. Henry, and the said premises were leased by the defendants, Clyde W. Henry and Constantine Parella, to defendants Capitol Chevrolet Company, the agent of defendant Lawrence Warehouse Company. Prior to April 9, 1943, defendant Clyde W. Henry gave defendant V. J. McGrew permission to remove said tank from said premises, but said defendant V. J. McGrew performed the acts which caused the destruction of plaintiff's goods, as aforesaid, as an independent contractor and not as an employee of defendant Clyde W. Henry. It is untrue that defendant Clyde W. Henry used or operated said torch on said premises in a negligent manner, or at all, and it is not true that any act of the defendant Clyde W. Henry was performed in a negligent manner. [72]

IV-A.

That said warehouse known as the "Ice Palace" was leased by defendant Capitol Chevrolet Company from Clyde W. Henry and Constantine Parella for use as a warehouse for the storage of tires, after inspection of said "Ice Palace" by plaintiff prior to said lease and with the consent, approval and authorization of plaintiff for the leasing of said premises and their use for the storage of tires and tubes.

V.

On April 9, 1943, defendants Lawrence Ware-

house Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire.

VI.

The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid.

VII.

By reason of said negligence acts of defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15. [73]

As conclusions of law from the foregoing facts, the court finds:

I.

The motions of defendants Lawrence Warehouse

Company, Capitol Chevrolet Company, and V. J. McGrew, to dismiss the above-entitled action, should be denied, and plaintiff Defense Supplies Corporation is entitled to judgment in its favor against said defendants, jointly and severally, for the sum of $41,975.15, together with plaintiff's cost of suit.

II.

The motions of defendant Clyde W. Henry to dismiss the action should be granted, and said defendant is entitled to judgment in his favor against plaintiff for said defendant's cost of suit.

Dated: April 15th, 1946.

LOUIS E. GOODMAN

[Endorsed]: Filed April 15th, 1946.

In the United States District Court for the Northern District of California, Southern Division

No. 23171G

DEFENSE SUPPLIES CORPORATION,

Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, CAPITOL CHEVROLET COMPANY, a corporation, CLYDE W. HENRY, CONSTANTINE PARELLA, V. J. McGREW, CHARLES ELMORE, FIRST DOE COMPANY, a corporation, SECOND DOE COMPANY, a corporation, FIRST DOE and SECOND DOE,

Defendants.

JUDGMENT

The above entitled action came on regularly for trial on the 13th, 14th and 15th days of February, 1945, before the court sitting without a jury, R. L. Miller, David E. Lombardi and Brobeck, Phleger & Harrison appearing for plaintiff Defense Supplies Corporation; W. R. Wallace, Jr., W. R. Ray and Williamson & Wallace appearing for defendant Lawrence Warehouse Company; A. J. Getz appearing for defendant Capitol Chevrolet Company; Louis J. Glicksberg appearing for defendant Clyde W. Henry and defendant Charles Elmore; Evan J. Hughes appearing for defendant Constantine Par-

cella; and Albert H. Gommo, Jr. appearing for defendant V. J. McCrew. [75]

Evidence both oral and documentary having been introduced the cause of having been submitted to the court for consideration and decision, and the court having delivered and filed its findings of fact and conclusions of law;

Now, Therefore, It Is Ordered, Adjudged and Decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McCrew, jointly and severally, the sum of $41,975.15 together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $196.55.

It Is Further Ordered, Adjudged and Decreed that said plaintiff take nothing from defendant Clyde W. Henry, and that said defendant Clyde W. Henry do have and recover from said plaintiff his costs and disbursements incurred in this action, amounting to the sum of $71.51.

Dated April 15th, 1946.

LOUIS E. GOODMAN,

Judge.

Approved as to form, as provided in Rule 5(D):
WILLIAMSON & WALLACE,
Attorneys for Lawrence Warehouse Company

Attorneys for Capitol Chevrolet Company.
LOUIS J. GLICKSBERG,
Attorney for Clyde W. Henry and Charles Elmore.
EVANS J. HUGHES,
Attorneys for Constantine Parella.
ALBERT H. GOMMO JR.,
Attorney for V. J. McGrew.

(Acknowledgements of Receipt of Copy.)

[Endorsed]: Filed and entered April 15, 1946.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL

To Defense Supplies Corporation, plaintiff, and to R. L. Miller, Esquire, David E. Lombardi, Esquire, and Brobeck, Phleger & Harrison, attorneys for plaintiff:

To the defendant Lawrence Warehouse Company, and to W. F. Williamson, Esquire, W. R. Wallace, Jr., Esquire, W. R. Ray, Esquire, and Williamson & Wallace, its attorneys;

To the defendant Clyde W. Henry and to Louis J. Glicksberg, Esquire, his attorney; and

To the defendant V. J. McGrew and to Albert H. Gommo, Jr., his attorney:

You and Each of You, Will Please Take Notice that the defendant Capitol Chevrolet Company, a corporation, intends to move the above entitled Court to vacate and set aside the decision of the Court rendered in the above entitled action, and to grant a new trial of said cause upon the following [77] ground materially effecting the substantial rights of said defendant, to-wit:

I.

Irregularity in the proceedings of the Court by which moving party was prevented from having a full and fair trial.

II.

Irregularity in the proceedings and conduct of the plaintiff by which moving defendant was prevented from having a fair trial.

III.

Accident which ordinary prudence could not have guarded against.

IV.

Surprise which ordinary prudence could not have guarded against.

V.

Newly discovered evidence, material to the moving

party, which he could not, with reasonable diligence have produced and caused to have admited at the trial.

VI.

Excessive damages, on the basis of plaintiff's proof, if any, thereof.

VII.

Insufficiency of the evidence to justify the decision of the Court in these particulars, among others, to-wit:

1. That the evidence is insufficient in this case to disclose any negligence on the part of this moving party.

2. That the evidence is insufficient in this case that plaintiff's damages, if any there were, were proximately caused by any act or omission on the part of this moving defendant.

3. That the evidence is insufficient in this case to prove that any damages were sustained by plaintiff. [78]

4. That the evidence is insufficient in this case to prove that the relationship between the defendant Clyde W. Henry and the moving defendant was other than exclusively that of landlord and tenant, and that defendant Clyde W. Henry's duties in the circumstances were non-delegable.

5. That the evidence is insufficient in this case to prove and indicate any distinction in the type, character or quantum of duty between that of the

moving defendant and the defendant Clyde W. Henry.

VIII.

That the judgment is contrary to and against the law.

IX.

Error and errors in law occuring at the trial and excepted to by the moving defendant.

That said motion will be made and based upon the records and files in the above entitled action and upon the minutes of the Court.

That said motion will be made at the time and place designated by the Court at the convenience of the Court and of counsel hereinabove named.

Dated: April 12, 1946.

A. J. GETZ,
GETZ & AIKENS
By A. J. GETZ,
Attorneys for Defendant
Capitol Chevrolet Company.

Affidavit of Service by Mail (C. Cp. 1013a)

State of California,
County of Los Angeles—ss.

Ann D. Walters, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action, That affiant's busines address is room 438, 714 West Olympic Boulevard, Los Angeles, 15, California. That affiant served a copy of the attached Notice of Intention

to Move for New Trial by placing a copy in an envelope addressed to Brobeck, Phleger & Harrison, Attorneys for Plaintiff, Defense Supplies Corporation, at their business address, which is 111 Sutter Street, San Francisco, California; a copy in an envelope addressed to Williamson & Wallace, Attorneys for Defendant, Lawrence Warehouse Company, at their business address, which is Suite 1111, 310 Sansome Street, San Francisco 4, California; a copy in an envelope addressed to Louis J. Glicksberg, Esq., Attorney for Defendant Clyde W. Henry, at his business address which is 1 Montgomery Street, San Francisco, California, and a copy in an envelope addressed to Albert H. Gomma, Jr., Esq., Attorney for Defendant V. J. McGrew, at his business address, which is 1 Montgomery Street, San Francisco 4, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on April 12, 1946, deposited in the United States Post Office box at 714 West Olympic Boulevard, Los Angels 15, California, so addressed. That there is delivery service by United States mail at the place so addressed, or regular communication by the United States mail between the place of mailing and the place so addressed.

ANN D. WALTERS

Subscribed and sworn to before me this 12th day of April, 1946.

[Seal] A. JAMES AYERS,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 15, 1946. [80]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 29th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman, District Judge.

This case came on regularly this day for hearing of motion for a new trial. After hearing C. B. Aikens, Esq., attorney for defendant, and R. L. Miller, Esq., attorney for plaintiff, it is Ordered that said motion be denied. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Lawrence Warehouse Company, a corporation, one of the defendants above named, hereby appeals to the Circuit Court of Appeals, Ninth Circuit, from the judgment entered of record in the above entitled case on the 15th day of April, 1946, and from the whole thereof.

WILLIAM R. WALLACE, JR.
WILLIAM R. RAY,
WILLIAMSON & WALLACE,
Attorneys for Defendant, Lawrence Warehouse Company, a corporation.

[Endorsed]: Filed June 14, 1946. [82]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

Lawrence Warehouse Company, a corporation, one of the defendants in the above entitled action and appellant hereby designates as the portion of the record, proceedings and evidence to be contained in the record on appeal in the above entitled matter, the following, to-wit:

1. Plaintiff's complaint.

2. Answer of Lawrence Warehouse Company and cross-claim against certain defendants.

3. Transcript of the testimony in question and answer form taken and received before the Honorable Louis E. Goodman, Judge of the above entitled Court, at the trial of the case, together with any and all exhibits offered and received during said trial. [83]

4. Interrogatories propounded to plaintiff by defendant, Lawrence Warehouse Company.

5. Answer to interrogatories propounded to plaintiff by defendant, Lawrence Warehouse Company.

6. Decision of Honorable Louis E. Goodman signed and filed herein.

7. Findings of Fact and Conclusions of Law signed and filed herein.

8. Order settling findings.

9. Judgment signed and filed herein.

10. Notice of appeal filed by Lawrence Warehouse Company.

Dated: June 10th, 1946.

W. R. WALLACE JR.

WILLIAM R. RAY

WILLIAMSON & WALLACE,

Attorneys for Defendant, Lawrence Warehouse Company.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed June 14, 1946. [84]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FROM PART OF JUDGMENT

Notice Is Hereby Given that Defense Supplies Corporation, plaintiff above named, appeals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the Judgment entered in this action on April 15, 1946, whereby it is ordered, adjudged and decreed that said plaintiff take nothing from defendant Clyde W. Henry and that said [85] defendant Clyde W. Henry do have and recover from

said plaintiff his costs and disbursements incurred in this action.

Dated: June 18, 1946.

THEODORE R. MEYER,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed June 19, 1946. [86]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

Defense Supplies Corporation, plaintiff above named, having filed herein a Notice of Appeal to Circuit Court of Appeals from part of Judgment, hereby designates as the portion of the record, proceedings and evidence to be contained in the record of appeal in the appeal of said plaintiff the following:

1. Items 1, 3, 6, 7, 8 and 9 included in the Designation of Record heretofore filed herein on behalf [87] of defendant Lawrence Warehouse Company, dated June 10, 1946, without duplication.

2. Answer of defendant Clyde W. Henry.

3. Notice of Appeal to Circuit Court of Appeals from part of Judgment filed on behalf of Plaintiff.

Dated: June 18, 1946.

THEODORE R. MEYER,
BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 19, 1946. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

To the Clerk of the Above Entitled Court:

Notice is hereby given that Capitol Chevrolet Company, a corporation, one of the defendants above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and the whole thereof, entered in this action on April 15, 1946.

Dated: July 10, 1946.

GETZ & AIKENS,
A. J. GETZ,
/s/ CAMERON B. AIKENS,
Attorneys for Appellant,
Capitol Chevrolet Company.

[Endorsed]: Filed July 11, 1946. [89]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

Capitol Chevrolet Company, a corporation, one of the defendants in the above entitled action and appellant hereby designates as the portion of the record, proceedings and evidence to be contained in the record on appeal in the appeal of the above entitled matter, the following, to-wit:

1. Items 1, 3, 4, 5, 6, 7, 8 and 9, set forth and included in the Designation of Record heretofore filed by the appellant and defendant, Lawrence Warehouse Company, a corporation, dated June 10, 1946, without duplication.

2. Answer of Capitol Chevrolet Company and cross-claim against certain defendants.

3. Notice of Appeal herewith filed by said Capitol Chevrolet Company.

Dated: July 10, 1946.

GETZ & AIKENS,

A. J. GETZ,

/s/ CAMERON B. AIKENS,

Attorneys for Defendant & Appellant, Capitol Chevrolet Company.

[Endorsed]: Filed July 11, 1946. [90]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that V. J. McGrew, one of the defendants above named, hereby appeals to the Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment entered in this action on the 15th day of April, 1946.

ALBERT H. GOMMO, JR.,
Attorney for V. J. McGrew.

[Endorsed]: Filed July 16, 1946. [91]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including September 2, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: July 23, 1946.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed July 23, 1946. [92]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 92 pages, numbered from 1 to 92, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, et al., Defendants, No. 23171 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $36.80 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 31st day of August A. D., 1946.

[Seal] C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [93]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 23171-G

DEFENSE SUPPLIES CORPORATION,

Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, CAPITOL CHEVROLET COMPANY, a corporation; CLYDE W. HENRY, CONSTANTINE PARELLA, V. J. McGREW, CHARLES ELMORE, FIRST DOE COMPANY, a corporation, SECOND DOE COMPANY, a corporation, FIRST DOE and SECOND DOE,

Defendants.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation,

Cross-Defendants.

REPORTER'S TRANSCRIPT

Tuesday, February 13, 1945.

Before: Hon. Louis E. Goodman, Judge. [*1]

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* Page numbering appearing at top of page of original Reporter's Transcript.

Counsel Appearing:

For Plaintiff: R. L. Miller, Esq., and David E. Lombardi, Esq.

For Defendant Lawrence Warehouse Company: W. R. Wallace, Jr., Esq., and W. R. Ray, Esq.

For Defendant Capitol Chevrolet Company: A. J. Getz, Esq.

For Defendants Clyde W. Henry and Charles Elmore: Louis J. Glicksberg, Esq.

For Defendant Constantine Parella: Evan J. Hughes, Esq.

For Defendant V. J. McGrew: Albert H. Gommo, Jr., Esq.

Mr. Miller: If your Honor please, this is an action for loss of automobile tires and tubes which were the property of the Defense Supplies Corporation, which is an agency of the United States.

The pleadings as to the jurisdiction of the court and as to the corporate existence of the Defense Supplies Corporation as an agency of the United States have been admitted by the defendants, so we do not propose to introduce any proof as to the status of the plaintiff, and its right to sue in this case. That has been admitted by the pleadings.

We propose to show that the Defense Supplies Corporation, [2] acting as an agency of the United States, collected in California a large number of tires under the so-called Idle Tire Program; that defendant Lawrence Warehouse Company entered into an agreement with the Defense Supplies Cor-

poration, whereby it agreed to store and keep those tires for Defense Supplies Corporation at various locations in California, including a location known as the Ice Palace, in West Sacramento, California.

We propose to show that the defendant Capitol Chevrolet Company acted as the agent of the Lawrence Warehouse Company, in the actual storage of tires in the Ice Palace, in West Sacramento, California; that there was collected and placed in storage a large number of tires; that due to negligence on the part of the Lawrence Warehouse Company and Capitol Chevrolet Company, those tires were destroyed by fire.

We propose to show that the defendant Henry was one of the owners of the building where the tires were stored; that that building had been leased to Capitol Chevrolet Company for use as a storage location; that the defendant Henry sent a certain employee by the name of the defendant McGrew to the warehouse premises without authorization from the Defense Supplies Corporation; that the defendant McGrew there negligently operated an acetylene torch and set fire to the premises. That, in substance, is the proof that we will offer.

The Court: Might I interrupt? Do you contend that the man who had the acetylene torch was the representative of the [3] owner of the building, or that he was an employee of the owner of the property?

Mr. Hughes: Might I suggest that he was an employee of one of the owners.

Mr. Miller: There are two joint owners. We

believe that our proof will show that the defendant McGrew was actually employed by the defendant Henry to go to the premises and remove a large piece of machinery, a metal tank, and that he used an acetylene torch carelessly and negligently and set fire to the premises. We believe that our proof will show that the defendants Lawrence Warehouse Company and Capitol Chevrolet Company were negligent in permitting the operation of an acetylene torch on the premises, and in permitting the defendant McGrew to go upon the premises for that purpose, contrary to the express instruction of the Defense Supplies Corporation.

We propose to show the value of these tires, and that Defense Supplies Corporation has sustained the loss alleged in the complaint.

With that preliminary statement I might ask at this time, in order not to delay the trial at a later time—there are certain writings and documents, originals of which are in the possession of the defendants, that we would like to request production of in court during the course of the trial. We would like, first, to have the defendant Lawrence Warehouse Company bring in a letter dated January 22, 1943, addressed to [4] Mr. William C. Hanley, Assistant Vice-President, Lawrence Warehouse Company, 37 Drumm Street, San Francisco, California.

Mr. Wallace: Do you want to pause and give me an opportunity to look it up, or do you want to read them all?

Mr. Miller: I will give you copies as I read

them, and then you can get them out of your files at your convenience. I do not want to delay the court while you are looking them up now.

The Court: Have you a list of them made up?

Mr. Miller: Yes, I have a list here.

The Court: Why not give that to Mr. Wallace?

Mr. Miller: I will give them to him. I would like to call to the stand Mr. McClellan.

Mr. Getz: Before proceeding with the testimony I would like to make a suggestion. I do not care to make a statement at this time, but I would like to make this suggestion, if I may, your Honor; I would suggest that the question of liability be determined first before we go into the question of damages, because that may save the court and counsel considerable time. Of course, the question of damages may be a difficult one, which the Court might want to take the testimony on through a master, if necessary, and if the court finds there is no negligence, the question of damages becomes unimportant. I am just making that suggestion in the interest of saving time.

The Court: We have that question of liability and damages [5] in every case. What would be so complicated about the damage to automobile tires?

Mr. Getz: There are some 27,000 tires involved in different grades and values.

The Court: You mean it may take some time?

Mr. Getz: Yes.

Mr. Miller: I think that perhaps Mr. Getz is more fearful than I am as to the matter of values; we feel that we can present in rather short testi-

mony evidence that will show the value of the tires that were destroyed. We recognize that there may be a dispute as to the value, but I would like, if you might, to proceed with that testimony.

The Court: You may put on your testimony in the regular order.

Mr. Miller: I would like to proceed in the regular order. I will call Mr. McClellan.

ALFRED D. McCLELLAN

called as a witness by the plaintiff; sworn.

The Clerk: Will you state your name to the court, please?

A. Alfred D. McClellan.

Direct Examination

By Mr. Miller:

Q. Mr. McClellan, what is your position or employment?

A. I am supervising examiner at the present time working for the Reconstruction Finance Corporation. [6]

Q. Do you in that capacity also work for the the plaintiff in this case, Defense Supplies Corporation? A. I do.

Q. Were you employed by Defense Supplies Corporation in April, 1943? A. I was.

Q. What was the work that you were doing then for Defense Supplies Corporation?

(Testimony of Alfred D. McClellan.)

A. At that particular time I was supervising what we call the Idle Tire Program.

Q. Who was your immediate superior in the Defense Supplies Corporation?

A. Mr. John McKee.

Q. Where is Mr. McKee now?

A. Mr. McKee is dead.

Q. What was Mr. McKee's position at the Defense Supplies Corporation?

A. He was at that time an agent for the Defense Supplies Corporation.

Q. He was an agent?

A. He was an agent.

Q. Are you familiar with Mr. McKee's signature? A. Yes, I am.

Q. I will show you a letter, Mr. McClellan, dated March 1, 1943, addressed to Lawrence Warehouse Company, which bears the signature of J. M. McKee, Agent, Defense Supplies Corporation, and down in the left-hand corner, "Accepted by Lawrence Warehouse Company, W. E. Hanley, Assistant V. P.," and I will ask you if that is Mr. McKee's signature there on. A. Yes.

Mr. Wallace: What are you trying to prove, the contract?

Mr. Miller: Yes.

Mr. Wallace: No objection.

Mr. Miller: I will offer this contract as Plaintiff's [7] Exhibit 1.

The Court: Is that the contract governing the storage?

(Testimony of Alfred D. McClellan.)

Mr. Miller: That is the contract governing the storage, is that right?

Mr. Wallace: It is a contract between Defense Supplies Corporation and Lawrence Warehouse Company.

The Court: All right. It may be admitted.

(The contract of March 1, 1943 was marked Plaintiff's Exhibit 1.)

Mr. Wallace: If your Honor please, counsel has handed me a typewritten document which is entitled, "DSC Form—28." There was a similar form, I have not checked it, but there was a mimeograph form entitled "DSC Form 28." Several copies of the mimeographed form were sent to the Lawrence Warehouse Company either at the same time that this agreement which has just been admitted in evidence was received, or shortly thereafter. We make no objection to it if it is an accurate copy of the one we received.

The Court: It may be admitted subject to correction.

(Document was marked Plaintiff's Exhibit 2 in evidence.)

Mr. Wallace: I will also stipulate that it is the form referred to in a document admitted in evidence.

Mr. Glicksberg: In view of the fact that we represent some defendants who had no connection with the agreement made, an admission made by the Lawrence Warehouse Company would not be an

(Testimony of Alfred D. McClellan.)

admission made as far as the defendant Clyde Henry was [8] concerned.

Mr. Wallace: It might assist the Court if somebody stated who the defendants are. Mr. Ray and I represent the Lawrence Warehouse Company, Mr. Getz, sitting here, represents the Capitol Chevrolet Company. The Capitol Chevrolet Company was the company who, as I understand, was the actual custodian of the tires. Mr. Gomma represents Mr. McGrew, who is the defendant who, it is claimed, carried the torch. Mr. Glicksberg represents Clyde Henry, who is one of the owners of the building, and also Mr. Elmore, who is a defendant, and about whom very little has been heard. Mr. Hughes is representing Mr. Parella, the other owner of the building. I think counsel for the plaintiff did not mention in his opening statement that aside from the action of Defense Supplies Corporation against all of the defendants, there is also on file a cross-complaint in which Lawrence Warehouse Company is cross-claimant against Capitol Chevrolet Company, Clyde W. Henry, and Constantine Parella, so that evidence introduce as against one defendant would not necessarily be evidence as against the others. There are various relationships between the parties. The Capitol Chevrolet Company and the other defendants have, of course, filed their answers denying in effect all the various allegations.

Mr. Getz: Capitol Chevrolet Company likewise has a cross-claim against Henry, Parella and McGrew, alleging that they were liable by reason of

(Testimony of Alfred D. McClellan.)

negligence. In reply to Mr. Miller's statement [9] that Capitol Chevrolet was the actual custodian, it will be our contention, and I think confirmed by the facts, that there was no single actual custodian, that the Defense Supplies Corporation was the real custodian, that we were merely acting with them in this program. I do not want the Court to have the impression in its mind that we acquiesce in that statement, because that is an important point in this case.

Mr. Wallace: If your Honor please, Mr. Gommo, counsel for Mr. McGrew, advises me that I inadvertently included his client, Mr. McGrew, in my statement of the cross-complaint of the Lawrence Warehouse Company. The Lawrence Warehouse Company did not cross-complain against Mr. McGrew.

Mr. Gommo: That is correct, Mr. McGrew is not a defendant in the cross-complaint of the Lawrence Warehouse, nor is he defendant in the cross-complaint by the Capitol Chevrolet Company.

Mr. Hughes: For Mr. Parella, I will state the only connection of his that will be shown is that he owned a half interest in the building; he had nothing to do with the men working in the building. His only connection is a half interest in the building, which he had rented.

Mr. Glicksberg: In so far as Mr. Henry is concerned, there are legal issues in addition to the factual issue; first of all, the question of the status of McGrew and Henry; secondly, in answer to the

(Testimony of Alfred D. McClellan.)

complaint of the plaintiff the defendant Clyde Henry has asserted that the Defense Supplies Corporation in reality was the undisclosed principal in the original lease [10] made between the Capitol Chevrolet Company, and Clyde Henry, and Parella, in which lease there is a provision releasing total liability from any source whatever. In addition, the defendants Clyde Henry and McGrew, take the position in answer to the cross-complaint of the Lawrence Warehouse and the cross-complaint of the Capitol Chevrolet, that Capitol Chevrolet Company was the agent of the Lawrence Warehouse Company, and the provision of the release inured to the benefit of Clyde Henry.

The Court: What is the Capitol Chevrolet Company, is that an automobile concern?

Mr. Getz: Capitol Chevrolet Company was an automobile concern and entered into a contract with the Lawrence Warehouse whereby they agreed to store the tires.

The Court: Did the Capitol Chevrolet Company have automobiles in these premises?

Mr. Getz: Not in these premises. This was the old Ice Palace, and there was nothing in the Ice Palace but tires—it was being used at the time for storage of tires.

The Court: Before the tires went in there did the Capitol Chevrolet Company rent this building?

Mr. Getz: It was rented expressely for the purpose of storing the tires by and with the consent

(Testimony of Alfred D. McClellan.)

and acquiescence of the Defense Supplies Corporation.

The Court: I take it that the Defense Supplies Corporation wanted a place to store tires.

A. Yes. [11]

The Court: So that they went to the Lawrence Warehouse.

Mr. Getz: Yes.

Mr. Wallace: I wonder if I might make a statement in that connection? I do not intend to make the statement for the purpose of binding anybody. For a substantial period before April, 1943, the Reconstruction Finance Corporation and then later the Defense Supplies Corporation had this problem of storing the tires that were turned in by civilians. They were stored in a very large number of places throughout the State. The Defense Supplies Corporation, or the Reconstruction Finance Corporation sent out their men to find where there was any available space to store the tires. They picked out places all over the State, Eureka, Fresno, Oakland, San Francisco, Sacramento, and various other places over the State. In a good many of these places there was an arrangement made with the Lawrence Warehouse Company that they would take what we might for lack of a better term and without attempting to bind anyone, but to give your Honor some picture, a kind of master contract, and then the storage was done by various other people who up to that time had no connection with the Lawrence Warehouse Company, under agreements

(Testimony of Alfred D. McClellan.)

made and approved by the Defense Supplies Corporation and the Lawrence Warehouse Company.

Now, in this particular Capitol Chevrolet arrangement, if my memory is correct, I think the Reconstruction Finance Corporation anticipated when this program started that there would be about 10,000 tires stored in Sacramento. Arrangements [12] were made with the Capitol Chevrolet Company to store that comparatively small number. Prior to the time that they hired this Ice Palace they already had eleven warehouses in Sacramento, in every conceivable kind of a vacant space; there was something like 100,000, so it was then decided to consolidate the tires in this big building that was called the Ice Palace, and that building was used as a consolidation warehouse.

The Court: All right, proceed with the evidence.

Mr. Miller: I might say, before proceeding with the evidence, in line with the remarks made by counsel for the defendant, that it is true that the Defense Supplies Corporation approved the agency agreement between the Lawrence Warehouse Company and the Capitol Chevrolet Company, and in fact that was the form of all agency agreements which Defense Supplies Corporation provided to the Lawrence Warehouse Company for use in dealing with its agents; and that the fact as the collection of these tires and their concentration in this one warehouse are substantially as Mr. Wallace has outlined them; and that, in order to avoid perhaps a good deal of testimony that the premises known

(Testimony of Alfred D. McClellan.)

as the Ice Palace in West Sacramento were inspected by an employee of the Defense Supplies Corporation, prior to its lease by Capitol Chevrolet Company for the purpose of storing these tires, and that Defense Supplies Corporation, through one of its agents in San Francisco, had authorized Capitol Chevrolet Company to enter into a lease and use these premises for storage purposes. [13] We are not going to contend or attempt to show that that did not take place.

Q. Mr. McClellan, do you know if all of the warehouse charges for the tires stored under this storage agreement in the Ice Palace in Sacramento, were paid? A. Yes, they were.

Q. Do you know how many automobile tires and tubes were stored in that warehouse?

A. At the time of the fire?

Q. On April 9, 1943—that was the date of the fire.

A. Yes. There were 27,601 tires and 1850 tubes.

Q. Now, can you tell me where you obtained that information?

A. That information was given to Defense Supplies Corporation by a letter from Mr. Hanley, of the Lawrence Warehouse Company, and by letter from Mr. Gordon Kenyon, of the Capitol Chevrolet Company.

Q. Mr. McClellan, I will show you a letter on the letterhead of Capitol Chevrolet Company, dated April 10, 1943, addressed to Defense Supplies Corporation, and bearing the signature of Capitol

(Testimony of Alfred D. McClellan.)

Chevrolet Co., by G. A. Kenyon, and ask you if that is the report you referred to when you said that you had ascertained the number of tires from a report from the Capitol Chevrolet Company?

A. That is the letter that I referred to.

Mr. Miller: I will ask that this letter go in evidence as Plaintiff's Exhibit next in order.

Mr. Getz: No objection.

The Court: It may be admitted. [14]

(Letter from Capitol Chevrolet Company to Defense Supplies Corporation, dated April 10, 1943, was marked Plaintiff's Exhibit 3 in evidence.)

Mr. Wallace: As to this letter that has been introduced in evidence with the consent of counsel for the Capitol Chevrolet Company, it is hearsay, of course, as to the Lawrence Warehouse Company.

The Court: It is merely as to the number of tires.

Mr. Wallace: As to the report as to the number of tires, I have no objection at all.

The Court: Let the letter be admitted in evidence for the purpose of fixing the number of tires.

Mr. Miller: I will ask counsel if he will agree that exhibit may be admitted for the purpose of showing that the tires were destroyed.

The Court: I suppose there is no dispute about that?

Mr. Wallace: There is no dispute.

The Court: There is no dispute that there were that many stored there and destroyed by fire? Can

(Testimony of Alfred D. McClellan.)

the Court take it as a fact that that was the number stored in the premises and that they were destroyed by fire?

Mr. Getz: In so far as Capitol Chevrolet Company is concerned, we have no evidence to the contrary.

The Court: If no counsel objects I will take that as a fact. There is no dispute, I suppose, that these tires belonged [15] to the Defense Supplies Corporation?

Mr. Getz: None, whatsoever.

Mr. Miller: Mr. McClellan, do you, in your position as an employee of the Defense Supplies Corporation, have access to all its records with respect to the tires received under the Idle Tire Program in this district, including Sacramento?

A. I do.

Q. And did you have access to the records showing the amount of money paid out by Defense Supplies Corporation to the owners of these tires?

A. I did.

Q. Do those records show the amount paid for different types of tires, such as scrap and grade tires? A. They do.

Q. Were the tires which were placed in this warehouse in Sacramento, the Ice Palace, actually examined, graded and appraised?

A. To the best of my knowledge they were, yes.

Q. When you say to the best of your knowledge, what do you mean?

A. We had been given to understand that all

(Testimony of Alfred D. McClellan.)

of the tires being transported to that warehouse had been appraised by our Sacramento appraiser.

Q. When you say you were given to understand, what do you mean?

A. The understanding was that all of the appraised tires would be transferred over to the Ice Palace.

Q. Understanding with whom?

A. With the Lawrence Warehouse Company and Capitol Chevrolet Company.

Mr. Wallace: I will have to object to the answer of the [16] witness as to his understanding.

The Court: Yes, that may be stricken.

Mr. Wallace: I ask that the three answers go out.

The Court: Yes.

Mr. Miller: Q. Did Capitol Chevrolet Company directly advise you that the tires had been appraised?

Mr. Getz: Just a moment before the witness answers. It calls for a conclusion. I would like to know by what method of advice, whether by letter or orally, or whether it was by somebody in authority.

The Court: Let me ask you, is there any dispute about this, that the tires were appraised?

Mr. Getz: I know nothing about it. So far as I know they may or may not have been appraised.

The Court: I suppose that counsel wants you to lay a foundation for that question, whether it was by letter or what.

(Testimony of Alfred D. McClellan.)

Mr. Miller: Q. Did you receive any report from Capitol Chevrolet Company with regard to the appraisal of these tires?

A. I can say that the letter we referred to reporting the tire loss would indicate that they were appraised.

Mr. Getz: I object to that.

The Court: The answer may go out.

Mr. Miller: Q. I will refer you again to Plaintiff's Exhibit 3, and ask you if that is the report to which you have referred in your statement with regard to the appraisal of these [17] tires.

A. Yes.

Q. What does that report show as to that?

A. It indicates that everything was appraised.

Q. What does it say?

The Court: I can read that as well as he can.

Mr. Wallace: Might I suggest to counsel that that letter was introduced only for the purpose of showing the number of tires in the warehouse on April 9.

Mr. Miller: That is right. I am using it to refresh this witness' memory as to the facts, to lay a foundation for his testimony that these tires were appraised.

The Court: What is your next question?

Mr. Miller: Q. Did you receive a report in writing from Capitol Chevrolet Company, showing the number of graded tires in the Ice Palace?

A. I did.

(Testimony of Alfred D. McClellan.)

Q. How many graded tires did that report show as being in the Ice Palace on April 9, 1943?

A. There were 14,237 graded tires.

Q. Did that report show the number of scrap tires in the warehouse? A. It did.

Q. How many?

A. There were 13,412.

Q. Did it show the number of scrap tubes in the Ice Palace on April 9, 1943? A. It did.

Q. How many? A. 1800 scrap tubes.

Q. Did it show the number of graded tubes?

A. It did.

Q. How many? A. 50. [18].

Q. I again refer you to Plaintiff's Exhibit 3, and ask you if in that report did it state that the figures were actual or estimated?

A. The figures quoted on the tires were actual, and those quoted on the tubes were estimated.

Q. Mr. McClellan, do you know the total number of graded tires received by Defense Supplies Corporation from all sources within the district, including Sacramento? A. I do.

Q. How many was that?

Mr. Wallace: If you Honor please, I will object to that as immaterial.

A. In Northern California there were 283,000——

The Court: Wait a minute. What is the materiality of that?

Mr. Miller: We would like to ask this question, we can connect it up. Unfortunately, we do not

(Testimony of Alfred D. McClellan.)

have the record of the Defense Supplies Corporation as to the tires in this warehouse; the tires were being moved in at the time of the fire; they were appraised before they went in; they do not have the appraisal for these identical tires. They do, however, have records showing the amount paid by Defense Supplies Corporation for all tires received in Northern California under the Idle Tires Program, including these tires. These figures are by graded tires and scrap tires. We propose to show the total amount paid out by Defense Supplies Corporation for this several hundred thousand tires, I think it will be that many in this area, which included these tires, and by that means and a computation made [19] by this witness, the average value—the average amount paid by the corporation for each graded tire. I do not think there will be any dispute as to scrap tires, because they paid the same amount for each scrap tire.

The Court: Is there a different amount paid for different grades of tires?

Mr. Miller: There was a different amount paid. The grades of tires, as I understand it, were new, used, and retreads. There were various grades of each. They were appraised at the ceiling price by appraisers. At the time there was no market for these tires in the legal sense of the term; they were tires taken by the government; there was no ready sale for them, because buyers were prohibited from buying unless they had the necessary OPA certifi-

(Testimony of Alfred D. McClellan.)

cate. We are in this case unable to show what the market value of these tires was.

The Court: But there was a ceiling price?

Mr. Miller: There was a ceiling price, and we are able to show what the ceiling price was for each one of these tires stored in this warehouse. We know how many graded tires there were.

The Court: You know the total number and ceiling of each grade?

Mr. Miller: We do not know how many of each grade, but we would like to put in evidence as to the amount the Defense Supplies Corporation paid for all of the tires, a large number [20] in this area. We feel that the average value, the average cost or average amount paid is a fair indication of what the Defense Supplies Corporation paid for these tires. It is evidence that we think should be before the court, because we are unable in this case to show what the market value was of these tires, in which event, I believe, according to law, we are permitted to put in all evidence of value which would tend to aid the court in determining what they were actually worth, because they did have a value.

The Court: Of course, there would not be any question but that there would be a variation in the value of high grade tires and the value of the lowest grade.

Mr. Miller: I don't think there is any question.

The Court: But you are unable to show how

(Testimony of Alfred D. McClellan.)

many of the better grades might have been included in this lot.

Mr. Miller: We do not know how many were new tires, how many used, and how many retreads.

The Court: Have you taken any depositions or directed any interrogatories to the Capitol Chevrolet Company, asking them whether they ever made such a grading?

Mr. Miller: We took depositions but I do not think that matter was mentioned in the depositions.

The Court: Do you know, Mr. Getz?

Mr. Getz: I don't know. All I can say is I don't know, but in any event we object further because it is highly speculative. [21] There are not only different grade of different tires, but there are different prices for different sizes; there are as many sizes as there are tires made in the automobile industry. One tire of one grade may be worth $1, and a tire of larger size in the same grade $2 or $3, and to attempt to get at it in this way would be highly speculative, highly prejudicial to us, because we have no way of cross-examining. I realize that we are going to have a very considerable difficulty in attempting to arrive at the value. In so far as the Capitol Chevrolet is concerned, I am willing to stipulate that if we are reliable it would be the value of the smallest tire in size.

The Court: Have you calculated what that amounts to in dollars and cents on the lowest grade?

Mr. Miller: I have not.

(Testimony of Alfred D. McClellan.)

Mr. Getz: I think it is $1 on the lowest grade—on 600-15 it is $1.

Mr. Miller: Mr. McClellan, have you a record of the number of grades into which these tires were graded? A. Yes, I have.

Q. How many grades were used in the grading of tires? A. Six different grades.

Q. Six different grades? A. Yes.

Q. What was the appraised value of the lowest grade?

A. The lowest grade in the smaller-sized tires had a value of $2.75. [22]

Q. Is that the price for used tires?

A. That is the price for what we call a smooth tire for the 3.75-18.

Q. That would be the lowest grade tire?

A. 3.75-18.

Q. That amount was what? A. $2.75.

Q. What was the appraised value used for the highest grade of the largest tires?

A. Well, I would say it would be a new tire, and that would vary according to the size; it would run anywhere from $12 up to $25.

Mr. Miller: I think now, your Honor, we would like to have the witness answer the question previously asked, which was objected to, to show how that average price paid by the corporation would compare with these figures that came in.

The Court: In your complaint I think you asked for $76,000. Apparently that is calculated on the basis of the lowest price?

(Testimony of Alfred D. McClellan.)

Mr. Miller: No, it is not. It is calculated on the basis of 20 cents for each scrap tire, because that is what the corporation paid, and there were 1800 scrap tires.

The Court: That is right.

Mr. Miller: It was based on a price of $3.48 for each graded tire, being the average paid by the Defense Supplies Corporation for all graded tires received in the program in Northern California.

The Court: So there is a difference of about 73 cents between the lowest grade and the average price?

Mr. Miller: That is right. [23]

The Court: Am I right, approximately?

Mr. Miller: Approximately, our average price used is somewhat less than the price of the lowest grade new tire. In computing the amount set forth in the complaint we add the actual cost of the Defense Supplies Corporation in getting these tires into the warehouse and the storage charges on them.

The Court: I will allow all of the testimony to go in as to the prices that you paid, and the prices that you appraised the tires for for each grade, and then we can determine at a later date whether it would be proper as a matter of law whether the Court can properly consider it anything more than the lowest appraisal.

Mr. Getz: Might I ask a question: Isn't it true

(Testimony of Alfred D. McClellan.)

that you sold the tires to the R. M. A. A. for less than the price you mentioned?

The Court: What is the R. M. A. A.?

Mr. Getz: That is the Rubber Manufacturers Association of America, Inc., that was formed for the purpose of distributing these tires to the public. Isn't it a fact that you sold them for less than you paid for them?

A. We did not sell them to the Rubber Manufacturers Association of America. They were our distributing agents.

Q. The price to them was less than the cost of the Defense Supplies Corporation, was it not?

A. We did not sell them to the R. M. A. A. [24]

Q. Did you fix a price at which they could resell for you? A. How is that?

Q. Did you fix a price at which they could resell them for you? A. I believe we did.

Q. Wasn't it less than the price which you paid for them? A. I could not say.

Mr. Miller: Q. Did you have charge of the sale or distribution of these tires for the Defense Supplies Corporation?

A. No, we had nothing to do with that end of it, at all.

Q. Did anyone in this office in San Francisco have anything to do with that? A. No.

Q. Therefore, the answer which you made is based upon the fact that you had no information, is that correct? A. That is true.

The Court: Are these amounts which the witness

(Testimony of Alfred D. McClellan.)

is going to testify to the amounts which you claim the government paid for these tires of the different grades?

Mr. Miller: Yes, it is, in this area.

The Court: All right.

Mr. Wallace: If your Honor please, I would like, for the purpose of the record, to make one further objection, which is based upon the testimony of this witness, that he does not know whether or not the Defense Supplies Corporation sold all of the tires they bought at a fixed price which was substantially lower than the price at which they purchased them, and I think, under the circumstances, the market value, that it what [25] the witness is attempting to do, would be reflected by the price at which they sold, not the price at which they purchased; so these figures get even more remote from establishing any kind of a market value.

Mr. Miller: I must say that so far as saying that the amount which Defense Supplies Corporation sold these tires was the market price, that certainly, in my opinion, is not legally the market price in the sense that we understand the term "market value."

The Court: Counsel, I do not want to get into an argument of this case now. There is nothing in the record as yet as to what factors should be taken into account in determining the value of these tires.

Mr. Miller: We started out to do that.

The Court: Suppose you do that now.

Mr. Miller: Q. Mr. McClellan, I will ask you if you know how many tires were received by the

(Testimony of Alfred D. McClellan.)

Defense Supplies Corporation in the Northern California District, under the Ide Tire Program.

A. Yes; there were 545,006 tires.

Q. How many of those were graded tires?

A. 283,857 graded tires of that total.

Q. How many scrap tires?

A. 239,820 scrap tires.

Q. How much did the Defense Supplies Corporation pay for all of the graded tires?

A. For the graded tires they paid $989,191.41.

Mr. Wallace: If your Honor please, may the record show that the witness is apparently reading from some paper.

Mr. Miller: Q. I will ask you, Mr. McClellan, in giving your testimony, are you referring to a memorandum made by you?

A. This is a memorandum that I prepared, myself.

Q. You prepared that from the original records of the Defense Supplies Corporation?

A. That is right.

Q. Where are those records?

A. Those records are kept at the Federal Reserve Bank in San Francisco.

Mr. Miller: If counsel wishes we can have those records brought into court by the custodian, the Federal Reserve Bank.

Q. Do the records of the Defense Supplies Corporation show the number of tires of each grade included in the inventory of graded tires?

A. Yes, they do—no—I may have misunderstood you on that.

(Testimony of Alfred D. McClellan.)

Q. You testified a little while ago that there were 6 grades of graded tires: That is correct?

A. Yes.

Q. Do the records of the corporation show the amount paid for each of the 6 grades?

A. Except for the fact that used tires, which include grades 1, 2, 3 and 4, are graded as a total.

Q. Do your records show the total amount paid for all tires of that grade? A. They do.

Q. Those three grades? A. Four grades.

Q. How many tires were included in that classification? [27] A. 279,933.

Q. How much did the Defense Supplies Corporation pay for those? A. $942,497.43.

Q. How many new tires were there?

A. There were 988 new tires.

Q. How much did the corporation pay for the 988 new tires? A. $18,011.38.

Q. Mow many retreads were there?

A. There were 2936 retreads.

Q. How much did the Corporation pay for the retreads? A. $28,982.60.

Q. How many scrap tires were received in the Idle Tire Program? A. 239,820 scrap tires.

Q. How much did the Defense Supplies Corporation pay for those scrap tires?

A. $49,719.

Q. Was that a fixed amount for each tire?

A. That was a fixed amount of 20 cents per each, regardless of condition.

Q. How many automobile tires were taken in

(Testimony of Alfred D. McClellan.)

in this whole area under the program, including Sacramento? A. 7133 used tubes.

Q. How many new tubes?

A. 385 new tubes.

Q. How much did the corporation pay for the used tubes? A. $9934.80.

Q. How much did it pay for the new tubes?

A. $1336.14.

Q. Are you familiar with the records of the corporation which show the amount of expenditures made by it in connection with the collection and storage of those tires? A. I am.

The Court: I think we will take a short recess now. [28]

(After recess.)

Mr. Miller: Q. How much did the Defense Supplies Corporation pay in transportation costs to move these tires to the warehouse?

Mr. Wallace: If your Honor please, I will object to that; I cannot see that it has any possible materiality in the case as to what the corporation might have paid to transport them.

The Court: What is the purpose?

Mr. Miller: We feel that in the absence of a market price for these tires under the then-existing conditions of the market and inability to find out what the market price was.

The Court: You have not laid any foundation for that. You have not put into the record anything as to the actual conditions at the time. You should develop what the situation was.

(Testimony of Alfred D. McClellan.)

Mr. Miller: I will withdraw that question.

The Court: I suggest you withdraw the question. I think the objection at this time is good.

Mr. Miller: Q. Mr. McClellan, I will ask you if you know the purpose of the Idle Tire Program?

A. Yes.

Q. What was the purpose?

A. The purpose was to obtain control of all usable rubber in the United States, due to the critical condition of our rubber supply.

Q. Were there restrictions at that time upon the sale of automobile tires?

A. There was; they could not be obtained without an OPA certificate. [29]

Q. Could the owners of automobile tires sell their tires freely to other persons?

A. They could not. They were required to sell them to the government.

Q. They could sell only to the Defense Supplies Corporation, is that correct? A. That is true.

Q. Those were regulations established by the government? A. That is right.

Q. Could automobile owners go out in the market and buy tires freely? A. Not freely, no.

Q. What were the requirements for the purchase of tires?

A. They had to have an OPA certificate before they could purchase them.

Q. And were there restrictions upon the prices at which tires could be sold? A. There were.

Q. And were those restrictions placed upon the

(Testimony of Alfred D. McClellan.)

sale of tires and the price of tires by the government? A. They were.

The Court: Q. The used tires were accumulated as a stock pile of rubber for remanufacture?

A. Yes.

Q. How about new tires?

A. The new tires were turned back, I believe, to the manufacturers. The used tires were put back through distributing channels of the ordinary dealers, and the scrap tires went to the reclaiming mills to salvage as much as ~~possible~~ of the rubber.

Q. Let me ask you this: There was a restriction on the number of tires that an individual could have, was there not? [30] A. That is true.

Q. It was the extra tires that people had that they had to turn in?

A. The extra tires that they had to turn in.

Mr. Miller: Q. How many tires were automobile owners permitted to keep?

A. A maximum of five.

Q. They were required to turn in all others to the government? A. That is right.

Q. They could not sell these extra tires to anyone else, is that correct? A. That is correct.

Q. You have testified that the new tires were returned to the manufacturers. What was the purpose of that?

A. I have not the regulations available on them, but my understanding is that they were to be held for government use only at that time.

Mr. Wallace: I ask that that answer go out.

(Testimony of Alfred D. McClellan.)

The Court: The last answer may go out.

Mr. Miller: Q. You have testified that used tires were redistributed to established dealers, is that correct? A. That is correct.

Q. Do you know the purpose of that restriction?

A. Yes, that was so they could be sold to people authorized to obtain them by the OPA.

Q. Was that to get the tires in the hands of essential users? A. That is correct.

Q. Is it a fair statement of the entire program that the reason for this program was to get essential automobile tires and [31] essential rubber out of the hands of persons who had no essential use therefore, and redistribute it to those persons who needed it in essential activities in connection with the war? A. That was the basis of it.

The Court: Are you going to produce any evidence as to the relation between the OPA ceiling price on the tires and the amount paid by the plaintiff for the tires?

Mr. Miller: We propose to put in through this witness a list of ceiling prices.

Q. I will ask you, Mr. McClellan, if you have a list of the ceiling prices by grades that was in effect for automobile tires in April, 1943?

A. I have.

Q. May I have that? A. Yes.

Q. This is entitled, "Idle Tire Purchase Plan. Price list applying to, 1, retreaded tires, and 2, used tires and tubes with reductions for repairs." I will ask you if this is the list of the prices by grade

(Testimony of Alfred D. McClellan.)

which were established by the Office of Price Administration? A. That is correct.

Q. Is this the OPA list of ceiling prices that was furnished to those who appraised the tires?

A. Yes.

Q. Were the appraisers who appraised the tires instructed to follow in their appraisal this price list? A. They were in valuing the tires.

Q. So that when the appraiser graded the tires he was to fix the price in accordance with this list, is that correct? [32] A. That is correct.

Mr. Miller: I ask that this go in evidence.

The Court: I do not suppose there would be any question about the OPA ceiling price? I imagine that is a matter of record.

Mr. Getz: That is right. As I understand, this is not an OPA document. This is some private document of the Defense Supplies Corporation.

The Court: The witness has testified that these were the OPA ceiling prices. I suppose if there is any inaccuracy in it you can compare it with the official list and correct it.

Mr. Miller: I suppose we could bring someone in from the OPA to testify to it if it is necessary.

Mr. Getz: So far as we are concerned, and as far as we could tell, it may or may not be the OPA list. These may be prices of the Defense Supplies Corporation.

The Court: The witness has said they are the ceiling prices of the OPA. You might examine him further about it, or get someone from the OPA.

(Testimony of Alfred D. McClellan.)

to testify. You gentlemen ought to be able to agree on this. These are all publicly-announced prices, and there cannot be any dispute about them.

Mr. Glicksberg: There is the further objection there is no materiality unless there is an actual showing of the particular kind of tire that was destroyed. It is subject to the objection which was made to your Honor this morning. [33]

The Court: I will admit it subject to that objection. I understand that the witness' testimony is that these are the prices according to the OPA then in effect.

A. That is correct.

The Court: If there is anything incorrect about that it can be corrected. I do not see that you need to take the court's time up on that.

Mr. Wallace: It will go in subject to our general objection as to all of this testimony?

Mr. Miller: I will ask that that go in as Plaintiff's Exhibit next in order.

The Court: Subject to the objection, which the Court reserves its ruling on, as to the values of these particular tires.

(Idle Tire Purchase Plan was marked Plaintiff's Exhibit 4.)

Mr. Getz: May it be understood that the objection originally made extends to all of this line of testimony, so that we do not have to repeat the objection each time, and will be subject to the Court's ruling?

The Court: That is as to this particular matter.

(Testimony of Alfred D. McClellan.)

If you have some objection on some ground as to some testimony of the witness, I think you should make it.

Mr. Getz: I merely meant as to the testimony as to value.

The Court: All right.

Mr. Miller: Q. Mr. McClellan, I will show you a pamphlet [34] which bears the caption on the front, "Idle Tire Purchase Plan. Price List applying to new tires and tubes," and I will ask you if that is a price list used in the program in determining the prices paid to tire owners for new tires and new tubes. A. That is correct.

Q. Were copies of this furnished to all appraisers? A. They were.

Q. And were the appraisers instructed to value new tires and tubes in accordance with the prices shown in this pamphlet? A. They were.

Q. Are the prices shown in this list the OPA ceiling prices in effect at the time?

A. They are.

Mr. Miller: I ask that this go in as Plaintiff's Exhibit next in order.

Mr. Wallace: We make the same objection.

The Court: That is subject to the same objection. So that the record will be clear on it, it is admitted subject to the objection that it is incompetent, unless there is a satisfactory showing as to the number and quantity of each type or grade of tire.

Mr. Wallace: There is the further objection that

(Testimony of Alfred D. McClellan.)

counsel is attempting to show, as I assume, the value of particular tires by showing average prices throughout a very large area for a very large number of buyers, which is too remote and too speculative to determine value of particular tires. [35]

Mr. Getz: That objection is reserved by all counsel.

The Court: All right.

(Document marked Plaintiff's Exhibit 5 in evidence.)

Mr. Miller: Q. Mr. McClellan, I will now ask you how many tires and how many tubes were received by Defense Supplies Corporation in Sacramento?

A. My record indicates that there was a total of 102,832 tires and 4883 tubes received in Sacramento.

Q. Do your records show what amount was paid by Defense Supplies Corporation to have those tires delivered to Sacramento?

Mr. Wallace: Just a moment, I object to that. I cannot see any possible materiality to the price or value or any other feature, as to transportation.

Mr. Miller: I think in the absence of market value, any evidence of cost or value is material to determine the loss which the plaintiff suffered in the destruction of these tires. In the finding of market value the court may consider all possible elements of value, including cost to the owner of the property, and certainly the amount that the corporation paid out to get these tires collected, the amount it paid out for this warehouse, the ware-

(Testimony of Alfred D. McClellan.)

house charges, the amount that it paid out to the appraisers for appraising it—that is all part of the value of the property in the hands of the Defense Supplies Corporation.

The Court: Wouldn't the OPA ceiling price be the only determining factor? I would think that once having shown that [36] price was fixed pursuant to the statute, by regulation of the Office of Price Administration, that that fixed the value at the time, unless you have something else in mind. If not, it would seem that way to me.

Mr. Miller: I will let your Honor rule on that point.

The Court: In order to protect your record you may have read into the record the amount of the transportation and I will rule it is immaterial, irrelevant and incompetent.

Mr. Miller: Q. Do you know the amount paid by the Defense Supplies Corporation for collecting the tires in Sacramento?

A. In Sacramento?

Q. Yes.

A. Only on an average basis of 26 cents per unit.

Q. When you say 26 cents per unit do you mean 26 cents per tire?

A. 26 cents per tire and 26 cents per tube.

Q. How did you determine that average?

A. I took all expenses paid to the Railway Express Agency, who were the transportation agency used in this program, for this entire area, which

(Testimony of Alfred D. McClellan.)

amounted to $142,302.15, and divided it by the total number of units received in this area.

Mr. Wallace: Then I have a further objection, that the witness is now testifying, when he says 26 cents for a 26-cent tire—he has already testified that some of the tires had a value of 20 cents. Now he is claiming he paid 26 cents to get a 20-cent tire.

The Court: Including transportation. [37]

Mr. Glicksberg: I think your Honor has made a ruling that it is inadmissible.

The Court: I am just allowing the witness to state the cost for the record and rule that the transportation cost is immaterial in fixing value. If you think I am wrong about that you can point that out.

Mr. Miller: I would like to reserve the opportunity to point it out.

Q. I will ask you, Mr. McClellan, if you know the amount per unit or per tire paid by the Defense Supplies Corporation to appraisers for appraising tires.

Mr. Glicksberg: Same objection.

A. Yes, I do.

The Court: I will sustain the objection to that.

Mr. Miller: It seems to me the cost of appraising tires is exactly in the same category as the transportation cost, and we would like the record to show what it did cost, and what was paid by the corporation.

The Court: I will sustain an objection to that.

Mr. Miller: Q. Do your records show the amount paid to the Lawrence Warehouse Company

(Testimony of Alfred D. McClellan.)

as warehouse charges on the tires which were destroyed in the Ice Palace?

A. Yes, they do, on an average unit basis.

Q. When you say "Yes they do, on an average unit basis," what do you mean?

A. We paid handling and warehouse charges to [38] Lawrence Warehouse Company up to March 31, 1943, a total of $17,216.85.

Mr. Wallace: May that answer go out?

The Court: Are you presenting this evidence in connection with market value?

Mr. Miller: Yes. We are showing what these tires were actually worth, and one of the elements of value as far as the corporation is concerned is the amount it had to pay for warehousing.

The Court: I will allow that to go in for the sake of completing your record, but I will sustain the objection to it on the ground that that is immaterial, irrelevant and incompetent.

Mr. Miller: Q. Did that include the amount paid to the Lawrence Warehouse Company for the storage of the tires which were destroyed in this Sacramento warehouse?

A. Yes, it did.

Q. You may proceed with your explanation of how you arrived at the per unit figure.

A. As of March 31, there was received in Sacramento 101,678 tires.

Mr. Wallace: That is the question to which the objection was sustained.

A. And 4455 tubes; these total units divided into the amount paid out results in an average of

(Testimony of Alfred D. McClellan.)

16 cents per unit for warehouse storage and handling.

Mr. Miller: You may cross-examine.

Mr. Wallace: Before proceeding with the cross examination, [39] I would like to move now to strike all of the testimony of this witness with relation to value of these tires on the ground that the evidence or testimony of this witness does not relate in any respect to the particular tires which are the subject of this litigation; that the evidence as introduced is purely speculative, it covers a large number of tires which might have been damaged, or in any other condition; the witness has testified he does not know what the corporation sold the tires for, or similar tires. It is an attempt by this witness by a mathematical formula to establish a value for articles not described with any accuracy, so that either the plaintiff or the defendants, or any of them, could have any idea that the tires about which this litigation is brought had the values as stated by this witness.

The Court: I will deny the motion to strike.

Cross Examination

Mr. Wallace: Q. Now, Mr. McClellan, in the early part of your direct examination I think you said that you were supervising examiner of the Idle Tire Program. A. That is right.

Q. Now, at what time were you the supervising examiner?

A. From the commencement of the program until the finish.

(Testimony of Alfred D. McClellan.)

Q. I think you said Mr. McKee was the agent.

A. One of the agents, yes.

Q. Now, how many other people in the Reconstruction Finance Corporation or the Defense Supplies Corporation were doing, let [40] us take first, examiner's work?

A. Well, that varied, according to the volume of work; it run from possibly two to six at times.

Q. Two to six? A. Yes.

Q. Who were they?

A. Mr. Baxter, Mr. Palmer, Mr. Hamm, Mr. Storey, and several others at different times during the program.

Q. Was Mr. McKee the only agent?

A. No, he was not.

Q. Who were the other agents?

A. Mr. McCullough, Mr. Titgen.

Q. Were they the only agents?

A. It is possible Mr. James was an agent at that time, but I am not sure.

Q. Do you not know and do not your records show that during this period Mr. James was an agent in this tire program?

A. It might have been at a later date.

Q. You think it could not have been at an earlier date?

A. I am not sure, I don't know when he received that title.

Q. At any rate, you know Mr. James was there?

A. He was there at times.

Q. When did this Idle Tire Program start?

(Testimony of Alfred D. McClellan.)

A. October 15, 1942.

Q. October 15, 1942? A. Yes.

Q. Are you sure it did not start before that?

A. That was the official opening date.

Q. I show you what purports to be a letter from Defense Supplies Corporation dated July 23, 1942, and ask you to look at that letter. Does that refresh your recollection as to the [41] opening?

A. Not as to the opening date of the program, no.

Q. Have you something in mind that there is some peculiar meaning to the opening date?

A. I might be able to clarify that by saying that October 15 was the first day on which the people would start turning their tires in, if that is what is called the opening date.

Q. However, for several months before that time various agents and examiners of the Defense Supplies Corporation had been preparing for this program, had they not?

A. Several months prior.

Q. And the letter I just showed you is a letter addressed to the Lawrence Warehouse Company, from the Defense Supplies Corporation, dated July 23, 1942, is it not? A. That is right.

Q. Who is that signed by?

A. By Mr. J. S. McCullough, Jr.

Q. Mr. McCullough was what?

A. An agent.

Q. Would you explain to his Honor the distinc-

(Testimony of Alfred D. McClellan.)

tion, if there is any distinction, between an agent and an examiner? A. Yes, there is.

Q. What is the distinction?

A. An agent has authority to sign and act for the corporation on official business, whereas an examiner more or less handles affairs of a routine nature, has no authority to sign or execute any contract or otherwise.

Q. Isn't it a fact that the custom is that any examiner that wants a letter sent out, writes the letter and presents it to the agent for signature?

A. That is true. [42]

Q. And he may present it to any one of the several people who are agents?

A. That is right.

Q. Who have that authority? A. Yes.

Mr. Wallace: I will ask that the letter which was just identified by the witness be marked as Defendants' Exhibit for Identification.

Mr. Miller: We have no objection.

The Court: Admitted.

(The letter of Defense Supplies Corporation to Lawrence Warehouse dated July 23, 1942, was marked Defendants' Exhibit A for Identification.)

Mr. Wallace: Q. During this period, going back to at least July, 1942, or in any event several months before the opening date that you have referred to as October 15, 1942, there were a large number of people employed by the Defense Sup-

(Testimony of Alfred D. McClellan.)

plies Corporation who were working on the Idle Tire Program, is that not true?

A. No, I believe at that period there were only one or two working on it.

Q. Do you remember who they were?

A. Yes, I believe there was Mr. Storey, Mr. Sperry, and Mr. Reynolds.

Q. Was Mr. Story the man that went out and picked locations all around the country?

A. Yes.

Q. Do you know what he did in that connection?

A. Just what I managed to pick up from reading the files.

Q. You do know that he went from one town to another in California, [43] trying to find space in which to store the tires that you anticipated getting?

A. That is true.

Q. And the letter that I have shown you, and which is marked Defendants' Exhibit A for Identification is a letter which shows that Mr. Storey presumably had found some twelve locations?

A. Probably so.

Q. Now, coming down to the time at which you said you were supervising examiner and Mr. McKee the agent, you did not then intend to mean you were the only examiner working on this program at that time? A. No.

Q. Nor that Mr. McKee was the only agent?

A. No.

Q. Now, you mentioned a Mr. Baxter. I think you said he was an examiner.

(Testimony of Alfred D. McClellan.)

A. That is right.

Q. What did Mr. Baxter do, what was his function?

A. Well, he took care of various matters that came up in the office and also did quite a lot of field work.

Q. Isn't it true that Mr. Baxter, with particular reference to Sacramento, was the person who did most of the field work in Sacramento after Mr. Storey? A. He did, I believe.

Q. Mr. Baxter was the person who was in immediate contact, in charge of the warehousing or storing of tires in Sacramento, isn't that true?

A. Yes.

Q. And Mr. Baxter was the man who had made the investigation which led to the storage of tires in the so-called Ice Palace? A. That is true.

Q. And Mr. Baxter, I think, made a report to the Defense Supplies Corporation upon all conditions at the Ice Palace? A. It did.

Q. As well as reports upon the other warehouses in all of the Sacramento area?

A. That is right.

Mr. Miller: I am going to object to this line of questioning on the ground that it is improper cross examination.

Q. It bears no relation whatsoever to the examination of this witness, what Mr. Baxter did and what Mr. Storey did has nothing to do with anything that this witness has testified to.

The Court: I don't know whether he is testing

(Testimony of Alfred D. McClellan.)

the witness' capacity to answer questions on direct examination. You have allowed it to go in thus far and have not objected.

Mr. Miller: I thought when he started out he was simply trying to show what his position was, but when he gets into Mr. Baxter's position, it has not anything to do with the direct examination.

Mr. Wallace: Let me ask one question:

Q. Have you got in the records a report of Mr. Baxter as to the value of these tires? A. No.

Q. Don't you know Mr. Baxter made a report the night after the fire, in which he set the value of these tires as not in excess of $30,000?

A. No, I can't say I have seen it.

Q. You don't know whether it is there, or not?

A. No.

Q. Do you know if Mr. Baxter went to Sacramento for the Defense Corporation the day of the fire? A. I do. [45]

Mr. Miller: I will renew my objection, because it has absolutely nothing to do with the direct examination of this witness. If the defendant wants to call him as their witness to testify I have no objection, but otherwise it has no connection with the direct examination.

The Court: Are you objecting to the question?

Mr. Miller: I will object to this line of questioning upon the ground that it is cross examination that bears no relation at all to the direct examination of this witness. It is upon an entirely different

(Testimony of Alfred D. McClellan.)

matter, it bears no relation to the examination in chief.

The Court: I will overrule the objection.

Mr. Wallace: Q. Have you in your files a letter or report from Mr. McKee on the value of these tires? A. As to the value, no.

Q. You don't know whether you have from Mr. Baxter, or not?

A. I can't say I have ever seen one by Mr. Baxter, no.

Q. Do you know or don't you know?

The Court: He wants to know whether you have a report from Mr. Baxter?

A. I don't know.

Q. You don't know? A. I don't know.

Mr. Wallace: Q. Will you look for the report from Mr. Baxter at lunch and if you find it let us have it after lunch? A. Yes.

Q. I think you testified that you did not know at what price [46] the Defense Supplies Corporation sold the tires that they gathered in.

A. That is true.

Q. I think you also testified as to the purpose of gathering these tires together, and is it not true that among the purposes of the RFC or the Defense Supplies Corporation as a creature of the RFC, was to set the price at which it would get in all of the tires in the United States?

A. The Defense Supplies Corporation had nothing to do with setting the price.

Q. You think the Defense Supplies Corporation

(Testimony of Alfred D. McClellan.)

had nothing to do with setting the price at which they purchased the tires?

A. As far as I know.

Q. Do you know whether the Reconstruction Finance Corporation had anything to do with it?

A. No.

Q. You don't know whether they did or did not?

A. No, I don't know.

Q. Now, I think you said that a person was permitted under the rules to retain only five tires.

A. That is correct.

Q. Is that a correct statement?

A. I believe so.

Q. Isn't it a fact that a person could keep five tires for every automobile he owned?

A. I believe you are right on that.

Q. So you meant it was five tires to a passenger car? A. Yes.

Q. Do you know whether that rule applied to trucks? A. I don't know.

Q. You don't know? A. No. [47]

Q. You were testifying, then, just from your general recollection of what you read in the paper at the time? A. Yes.

Q. Now, you testified as to, I think you said some $17,000 worth of warehouse charges, some such figure as that. Was that a figure running from the beginning to the end of the complete program?

Mr. Glicksberg: I do not think your Honor allowed that in the record.

(Testimony of Alfred D. McClellan.)

The Court: I allowed the witness to give his figures in the record as to the warehouse charges.

Mr. Glicksberg: But I think it is not before your Honor. I do not think it is proper cross-examination.

The Court: As long as it is in the record I think counsel should have the right to question him. When the court decides the matter it can indicate upon what evidence it bases its judgment.

Mr. Getz: May it be understood that in our failing to object we are not thereby waiving the original objection.

The Court: Yes.

Mr. Wallace: May I have the question read?

(Question read by the reporter.)

The Court: For what period of time was that?

A. That amount for handling and warehousing was from the beginning of the program until March 31, 1943.

By Mr. Wallace:

Q. That included all charges for storage in [48] Sacramento and all of the warehousing in Sacramento? A. That is true.

Q. Did it also include charges for the consolidation of the tires? A. No, that was separate.

Q. That was separate? A. Yes.

Q. Did it include the charges made by the Burns Detective Agency? A. No.

The Court: We will take a recess now until two o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [48a]

Afternoon Session, February 13, 1945

2 p.m.

ALFRED D. McCLELLAN

recalled;

Cross-Examination (resumed)

By Mr. Wallace:

Q. Mr. McClellan, before the noon recess I asked you if you would look and see if you could find a report made by Mr. Baxter to Defense Supplies Corporation on the subject of the value of the tires that were destroyed.

A. I could not find one.

Q. Did you look through the files at the RFC?

A. I did.

Q. Did you discuss this question with any of your other officers or employees? A. No.

Q. You did not? A. No.

Q. You just looked through the files to see if you could find a letter? A. Yes.

Q. Now, you mentioned, I think, in your direct examination, an appraisal in grade of the tires. That was done, as I understand it, by your employees.

A. Appraisers appointed by us.

Q. That had nothing to do with the warehouse company, or the warehousing of the tires?

A. No.

Q. That was something you had done?

A. That is right.

Q. Entirely separate? A. That is right.

(Testimony of Alfred D. McClellan.)

Mr. Wallace: I wanted that point clear, because my understanding is that the letter from the Capitol Chevrolet Company was introduced only to show the number of tires. There is a [49] reference there to grades, but that reference is pure hearsay.

The Court: The witness has testified that apart from the letter that they had the number of tires in certain grades, as I recall. I take it he did that on the basis of the appraisement that was made by the plaintiff.

Mr. Glicksberg: He has testified to no particular grades other than one lot of graded tires and one of non-graded tires, scrap tires. He just segregated all of one grade into graded tires.

Mr. Wallace: All I wanted to make clear is any reference in the letter would be hearsay, it would only be information Chevrolet got, they did not know anything about that.

The Court: That may be true, but the witness has testfied that there was that many tires that were graded, as I recall the testimony.

By Mr. Wallace:

Q. Mr. McClellan, do you of your own knowledge have any knowledge of how many tires in that warehouse were graded?

A. Only what was reported by this letter.

Q. Only what was reported in the letter that you have seen? A. That is right.

Q. And which was introduced in evidence?

(Testimony of Alfred D. McClellan.)

A. Yes.

Mr. Wallace: I think that is sufficient. The point I make about it is as far as the warehouse company is concerned that reference in the letter as to grading was pure hearsay on the part of the Capitol Chevrolet Company, because they neither graded or appraised the tires. [50]

The Court: I understand they got the information from appraisers.

Mr. Wallace: I do not think there has been any evidence on that, at all.

The Court: Clear it up if you wish to.

Mr. Wallace: I take it that this witness testified that he does not know anything about it except the information which he got from the letter.

Q. I think that is what you said, Mr. McClellan?

A. Yes.

Q. You said a moment ago that appraisers for the Defense Supplies Corporation appraised and graded these tires. A. Yes.

Q. Do I understand you do not have the reports of these appraisers?

A. We have a report on each tire appraised, but they are filed in such a manner that it would be difficult if not impossible to segregate them. We have the individual appraisements and reports.

Q. But is there any way you can, from your reports, tell us (a) what tires were in that warehouse, and (b) how they were appraised, and (c) what class they were in, what grade?

(Testimony of Alfred D. McClellan.)

A. No, there is not, because the minute it was appraised it lost its original identity.

Q. So there is no way you can tell us from your records what tires were in the warehouse, what the grade of those tires was, and how much they were appraised; or what stores they were in.

A. No. [51]

Q. Your answer is no? A. No.

The Court: Of course, the letter might be hearsay as to any of the other defendants; it would not be hearsay as to the defendant Capitol Chevrolet Company.

Mr. Getz: I think what Mr. Wallace wished to indicate was that the letter was compiled from hearsay, and that it is a matter to be developed.

The Court: Are you through with the cross-examination?

Mr. Wallace: Yes.

By Mr. Getz:

Q. Mr. McClellan, I call your attention to Exhibit No. 4, which is the price list furnished by the Defense Supplies Corporation to the appraisers, and particularly to the table IV-A; Table IV-A contains the lowest grade of the smallest tire that you gave us as $2.75.

A. No, that is not the lowest grade, that is 1, 2, 3, and 4.

Q. Will you turn to Grade 4—is that the next page? A. There.

Q. The lowest price for that smaller tire was $2.75, that you appraised it at, isn't that right?

(Testimony of Alfred D. McClellan.)

A. For that type of tires, yes.

Q. I call your attention to the second column, which reads as follows: "Deduct this amount for each vulcanized spot repair needed, if the tire is unrepaired," and in the same line with the figure $2.75 is the figure 90 cents; that means, does it not, that if there was any spot on the tire as the appraiser [52] appraised it he must deduct from the $2.75 90 cents for each spot?

A. That is true.

Q. So that while they might be grade 4 and have a base price of $2.75, you might not have paid more than 75 cents for each, or any equivalent of 90 cents, depending on the number of spots requiring repair on the tire?

A. That is right.

Q. As a matter of fact, most of these tires were in bad shape, isn't that true?

A. I would not say that.

Q. A large percentage of them were, were they not?

A. A percentage of them were, yes.

Q. People in selecting the five tires that they were permitted to keep selected their five best tires to keep and turned in the worst they had, isn't that correct?

A. Yes.

Q. So that while there might have been 14,000 graded tires in that Ice Palace at the time it burned, there is no way of determining what the Defense Supplies Corporation actually paid for those 14,000, isn't that true?

A. Not for that particular portion, no.

(Testimony of Alfred D. McClellan.)

Q. It might have varied from 90 cents on up to the highest price? A. Correct.

Q. And the scrap tires were blanketed in at 20 cents? A. That is right.

Q. Isn't it further a fact that the Defense Supplies Corporation paid the owner of the tire the amount based on the original appraisal; in other words, if an appraiser appraised a man's [53] tire at $2.75, or $2.05, that is the amount that the Defense Supplies Corporation sent him and paid?

A. Yes.

Q. Isn't it also true that afterwards it was found that the grade was incorrect and they were regraded on several different occasions after they had been paid for?

A. In some cases, it was, yes.

Q. So that a tire might have been graded Grade 1, or Grade 2, or Grade 3, and when it was turned over to the R. M. A. A. or to the dealer who actually bought it, it might have been graded down to 1, or 2, or even 3 grades lower?

A. Or, vice versa, it might have been graded higher.

Q. Or, vice versa, it might have been graded higher? A. Yes.

Q. So that the prices that the Defense Supplies Corporation paid to the owners did not necessarily represent the value of the tire?

A. It represented the value as placed by the original appraiser.

(Testimony of Alfred D. McClellan.)

Q. But you have said that that appraised corrected.

A. On some occasions it was corrected.

Q. As a matter of fact, isn't it true that it was found that there was a very large margain in grades of these tires and when you attempted to sell them to dealers you were unable to sell them at the grades they were graded, and you had to regrade them?

A. I could not say that, because I did not handle them.

Q. Assuming that a tire dealer desired to buy 1000 tires of [54] these surplus idle tires, the Defense Supplies Corporation issued an order to that person to get the tires from the warehouse?

A. No.

Q. Who issued those orders?

A. The Rubber Manufacturers Association of America, Inc.

Q. The R. M. A. A. acted as agent for the Defense Supplies Corporation in the resale of tires?

A. Yes.

Q. The R. M. A. A. received a commission, did they not, for each tire that they handled?

A. I would not know.

Q. You don't know as to that? A. No.

Q. Do you know whether the R. M. A. A. sold these tires to the dealers at the ceiling price or at discount below the ceiling price?

A. I would not know.

Q. The dealers who purchased the tires and

(Testimony of Alfred D. McClellan.)

resold them to the customers sold them only at the OPA ceiling price?

A. I imagine that would apply.

Q. It would cost that dealer considerable money in order to sell that tire and get that ceiling price out of it, wouldn't it? A. I couldn't say.

Q. This states, "Corrected copy—All others should be destroyed." Do you know whether this was the one which was actually in effect on April 5, or had this been corrected?

A. That was not corrected prior to October 15.

Q. October 15? A. Yes.

Q. Not corrected before that time?

A. No. [55]

Q. The grading of the tires was based upon the theoretical amount of rubber left on a casing, isn't that right?

A. The depth of the remaining treads.

Q. And the price was determined at ceiling price less the cost of putting it into usable condition, whatever it might be—the price paid was that ceiling price for that particular grade of tire, the tire having that amount of wear, less the cost of restoring it or repairing it and making it usable?

A. The price of necessary repairs.

Q. Just one more question, I don't know whether you know this, or not. Do you know whether or not in the sale of these tires there was one price for retail and one for wholesale?

A. I could not say, no.

Q. If there was a different price at retail and a

(Testimony of Alfred D. McClellan.)

different price at wholesale, you don't know whether these prices are the retail or the wholesale prices?

A. These are the retail prices.

Q. These are the retail prices? A. Yes.

The Court: Anything else, counsel?

Mr. Hughes: Might I ask one question, Mr. McClellan:

Q. Did the government, so far as you know, always pay these ceiling prices?

A. As far as I know this schedule was the only price that was ever paid.

Q. The agents were not permitted to buy any at less? A. No.

The Court: Anything else, counsel?

Mr. Miller: I have a few questions. [56]

Redirect Examination

By Mr. Miller:

Q. Mr. McClellan, were these tires graded before they were moved into the Ice Palace warehouse?

A. Substantially, yes.

Q. When you say "substantially, yes," what do you mean?

Mr. Wallace: We ask that the answer go out as not responsive.

The Court: It will go out.

Mr. Miller: I will reframe the question:

Q. Mr. McClellan, the tires that are stored in the Ice Palace warehouse, were those tires that were delivered directly there by the express company from the owners of the tires?

(Testimony of Alfred D. McClellan.)

A. Except for the 580 I would say no; they were delivered to the other warehouses.

Q. When you say except for 580, what do you mean?

A. There were substantially about 580 tires delivered directly there by the Railway Express.

Q. All the other tires were delivered at the other storage places? A. Yes.

Q. Were they graded at the other storage places?

A. To the best of my knowledge they were.

Q. When you say to the best of our knowledge they were, what do you base your answer on?

A. On reports received from our chief appraiser and payments made to him on the basis of appraisal. [57]

Q. Then to the best of your knowledge, the tires, except for 580, were graded and appraised before they were moved to the Ice Palace, is that correct?

A. That is correct.

Q. Was the warehouseman instructed to store graded tires and the scrap tires separately?

A. He was.

Q. Were the graded tires marked or labeled to indicate that they were graded tires?

A. They were.

Q. Was the grade shown on each tire?

A. It was.

Mr. Wallace: That is all.

Recross-Examination

By Mr. Wallace:

Q. I take it that all of this testimony that you

(Testimony of Alfred D. McClellan.)

have given, Mr. McClellan, was obtained by your from some reports or records—you never say any of these tires? A. That is true.

Q. You never did any of the warehousing?

A. Not in Sacramento, no.

The Court: Is there anything else?

Mr. Getz: If your Honor please, in excusing Mr. McClellan at this time, might I say that we later may want him as a witness, and we are not now waiving our right to call him under cross-examination, under 2055. We would like to have him remain in attendance or be on call.

Mr. Miller: We will see that Mr. McClellan is either here or on call. He has to go back to his office, but he will be on call so we can get him back here on short notice. [58]

Mr. Wallace: I think, your Honor, in view of the somewhat unusual condition of the record as to the testimony of this witness, particularly as to the value, it might be well if I, at this point, repeat our motion to strike all of his testimony in so far as it relates to the value of the tires for the reasons I stated in the earlier motion.

The Court: I think your objection goes to the weight of the testimony. The government may connect it up further, I don't know. I will deny the motion.

Mr. Miller: Also, for the purpose of the record, I would like to be sure that the record shows that we offered proof as to the expenditures made by Defense Supplies Corporation in connection with the collection, handling and storage of these tires.

that an objection to that testimony was sustained, and we reserve an exception thereto.

The Court: You have already covered that.

Mr. Miller: I wanted to be sure of our exception.

The Court: It is not necessary to take an exception.

Mr. Miller: I will call Mr. Henry, under Rule 43, under the adverse rule.

Mr. Wallace: Under the state of the record, Mr. Henry is one of the defendants, and I take it that he may be called and his testimony taken in so far as the charge of the plaintiff against him is concerned. As far as the Lawrence Warehouse Company is concerned, they would not be bound by his [59] testimony. On the other hand, there are a number of other defendants including the warehouse company and the Capitol Chevrolet Company, and we take it that the rule does not apply to the other defendants.

CLYDE W. HENRY

called as a witness by plaintiff under Rule 43; sworn.

The Clerk: Will you state your name to the Court, please?

A. Clyde W. Henry.

Direct Examination

By Mr. Miller:

Q. Mr. Henry, what is your business?

A. I am in the utility business.

(Testimony of Clyde W. Henry.)

Q. Might I ask what you mean when you say you are in the utility business.

A. I own some power and light companies and machinery company, and I operate them.

Q. Did you own or were you one of the owners of the premises known as the Ice Palace in West Sacramento? A. Yes, I was.

Q. Did you own it in April, 1943?

A. Yes, I was a half owner at that time.

Q. Who was the owner of the other half?

A. Mr. Charles Parella.

Q. Do you know if that is the same person who is named in the complaint in this case as a defendant as Constantine Parella?

A. That is the same gentleman, yes.

Q. Did you on or about the 1st day of March, 1943, lease the premises known as Ice Palace to Capitol Chevrolet Company?

A. We leased it, yes, we did. [60]

Q. I will show you a document which purports to be a lease.

The Court: Is there any question about the lease, gentlemen?

Mr. Miller: Is there any question about this lease?

Mr. Getz: I produced it at the request of counsel.

The Court: May it be admitted in evidence?

Mr. Getz: Yes.

Mr. Miller: We are willing, if this goes in, that it be withdrawn and a copy put in in its place, if you want the original lease to remain in your file.

(Testimony of Clyde W. Henry.)

Mr. Getz: Very well.

The Court: It may be admitted.

(The lease was marked Plaintiff's Exhibit 6, in evidence.)

By Mr. Miller:

Q. How long before April 9, 1943, did you acquire the ownership or your interest in the Ice Palace?

A. I would say two or three months previous to March 1.

Q. Was there any machinery or equipment in that building? A. At which time?

Q. When you acquired it.

A. There was some machinery and equipment in that building, yes, but I believe the majority of that machinery and equipment had been removed previous to the time that we acquired it.

Q. What machinery or equipment was there in there on April 9, 1943, do you know?

A. There was some pipe and steel tank. [61]

Q. Where was that steel tank situated?

A. In the refrigeration room, referred to usually as the engine room.

Q. For clarity of the record and for the benefit of the Court, can you briefly describe the premises?

A. That is, the main building?

Q. The main building and engine room.

A. The main building consisted of a frame building approximately 200 feet wide and 400 feet long, and at the end of the building there was a refrigeration room where the motors and the refrigerators

(Testimony of Clyde W. Henry.)

were operated, and that building was approximately 25 to 30 feet wide—about 25 feet wide and about 40 feet long, approximately, and it was separated from the main building by a concrete wall, and had a fireproofed roof on it, and it had steel girders, and a concrete floor; and between this refrigeration room and the main building there was a fire door. That is about the characteristics of the building.

Q. Might I ask you about this refrigeration room, did that have a common wall with the main building? You have mentioned a fire wall.

A. It had a concrete wall with the main building.

Q. But it was not separated from the main building?

A. The concrete wall, I believe, was right against the wall of the main building, it was right against it.

Q. There was a door in that wall between the refrigeration room and the main building, is that correct? A. That is correct.

Q. On what corner of the main building was that engine room [62] situated?

A. I would say on the southeast corner.

Q. That would be to the rear of the main building? A. Yes, to the rear and south.

Q. To the rear and south? A. Yes.

Q. You have stated that there were certain pipes and a tank in the engine room, or refrigeration room on April 9, 1943. Who owned that tank at that time? A. I did.

Q. You owned it? A. Yes.

Q. Did Mr. Parella have any interest in that?

(Testimony of Clyde W. Henry.)

A. No.

Q. Had you acquired that separated from your acquisition of the building?

A. I had acquired that previously to the acquisition of the propery from the Ice Palace Corporation.

Q. The engine room, you said, had steel girders. Was the wall of wood?

A. Three walls were of wood, the three walls that were next to the concrete wall.

Q. This tank that you have testified was in the engine room, will you describe that?

A. It was a steel tank, quarter-inch plate, approximately seven feet high, and about twelve feet wide, I would say, and about sixteen to eighteen feet long.

Q. Where was that situated in the engine room?

A. It was situated right in the engine room, approximately in the middle of it.

Q. Was it in the center of the room, or against the wall? A. It was against the wall.

Q. Was it set directly on the floor?

A. I believe that there [63] were some blocks under it, I am not positive.

Q. Was there any other machinery in the engine room that you recall in April, 1943?

A. No, there was no other machinery.

Q. Do you know a man by the name of McGrew?

A. Yes, I do.

Q. I will show you a drawing, Mr. Henry, that purports to be a sketch of the Ice Palace and the engine room; it is not a scale drawing; I will ask

(Testimony of Clyde W. Henry.)

you if you will look at that drawing and tell me whether that is a fair representation of the physical layout?

A. It is a very good representation of it, yes.

Q. There are no dimensions on that, but you would say that is a fair representation?

A. Yes.

Q. Would the room or little square black marked "2" be the engine room? A. Yes.

Q. And in that is a triangular figure marked "3": would that be a fair representation of the position of the tank?

A. I would say it would be a fair representation, with the exception of the fact that it should be about twice as wide as this is.

Q. About twice as wide as represented?

A. Yes, it is much wider than that.

Mr. Miller: We would ask that this go in for the purpose of showing the general physical layout of the building and the engine room. That is not a scale drawing, it is just a sketch. This is prior to the fire. We will ask that it go in as Plaintiff's Exhibit 7. It will be understood that this is subject to any correction as to the position of the [64] doors, or other things that may be developed by any witness during the trial, and as to direction. There is a dispute as to direction.

The Court: It may be admitted and marked.

(The sketch was marked Plaintiff's Exhibit 7, in evidence.)

Mr. Miller: Q. I refer you again to this Plain-

(Testimony of Clyde W. Henry.)

tiff's Exhibit 7 and point out to you thereon there is a No. 6 and a No. 7, and between the two there is drawn a double line. Is that the fire wall to which you have referred?

A. That is correct.

Q. Do you recall how many doors there were in the west side of the main building?

A. In this building?

Q. Yes. A. I believe it has two doors.

Q. Then there were also two doors in the east side of the building, is that correct?

A. That is correct, also.

Q. And there was one main door in the front of the building?

A. That is correct, a double door.

Q. And a door between the engine room and the main building? A. That is correct.

Q. And one door in the side of the engine room, also? A. That is correct, also.

Q. Leading to the outside?

A. That is not marked on there.

Q. I think this was supposed to be a door, there is a mark.

A. Oh, yes, that is correct.

Q. You have testified that the engine room was at the southeast [65] corner of the main building. Counsel has called my attention to the fact that on this side it shows at the southwest.

A. My directions apparently are at variance with the drawing, but the building is in that location.

Q. I do not think it is going to make very much difference in any event, is it?

(Testimony of Clyde W. Henry.)

Mr. Getz: Counsel, might we have a statement for the record as to who prepared this sketch?

The Court: What difference does it make? Why waste time? The witness says it is a fair representation.

Mr. Miller: I don't know who prepared this. We found this in the files of the Defense Supplies Corporation.

The Court: Proceed.

Mr. Miller: Q. On or about April 9, 1942, or shortly before that date, did you send a Mr. McGrew to the Ice Palace to take out a bronze tank in this engine room?

A. You mean 1942 or 1943?

Q. 1943? A. No, I did not.

Q. What was your relationship with Mr. McGrew?

A. Mr. McGrew was a contractor whom I had employed over a period of about eight years drilling wells for me.

Q. Was he working for you in April, 1943?

A. He had a contract with me in April, 1943.

Q. What was that contract for?

A. For drilling wells.

Q. Do you know a Mr. Sanchez?

A. Yes. [66]

Q. Does Mr. Sanchez work for you?

A. Yes.

Q. Do you know a Mr. Elmore? A. Yes.

Q. Did Mr. Sanchez and Mr. Elmore both work for you in April, 1943? A. Yes.

(Testimony of Clyde W. Henry.)

Q. Did you send either one or both of those men to the Ice Palace to remove this brine tank?

A. No.

Q. Did you send anyone there to remove the brine tank? A. No.

Q. Did you request Capitol Chevrolet Company for permission for anyone to go upon these premises and remove this brine tank? A. No.

Q. Did you send Mr. Sanchez down to the Capitol Chevrolet Company with a card from you asking that he be permitted to go upon the premises and remove machinery and equipment, or the brine tank? A. No.

Q. Do you ever recall writing a note or memorandum which reads, "Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer, Mr. Tony Sanchez, to enter with his two men to remove pipe and equipment."?

A. Yes, I remember writing that card.

Q. Did you give that card to Mr. Sanchez?

A. Yes, I did.

Q. Did you then send him to the Ice Palace?

A. I directed him to go to the Ice Palace with that card.

Q. With that card? A. Yes.

Q. And the two men that you mention in that card were Mr. Elmore and Mr. McGrew?

A. Mentioned in what?

Q. In this writing in which you state, "Please allow bearer, Mr. [67] Tony Sanchez, to enter with his two men." A. No.

(Testimony of Clyde W. Henry.)

Q. What two men did that refer to?

A. The two men that Mr. Sanchez might have had.

Q. Mr. Sanchez was at that time employed by you? A. That is right.

Q. What was his position with you?

A. Superintendent of the waterworks. [67½]

Mr. Glicksberg: At this time may we have a foundation laid as to the time and place of this card? I think it is quite material.

The Court: All right. I thought he had asked that.

Mr. Glicksberg: Not as to the time it was given.

Mr. Miller: Q. I will ask you now, Mr. Henry, when was that card given Mr. Sanchez?

A. Oh, I would say probably around April 1, as close as I could estimate.

Q. Of 1943? A. That is correct.

Q. Do you know if Mr. Sanchez went to the Ice Palace?

The Court: I think the witness said a moment ago he did not give the card, and then he changed his testimony.

Mr. Glicksberg: No, I do not think there is any such thing as the witness changing his testimony.

The Court: He may have misunderstood the other question.

Mr. Glicksberg: That is why I asked to have the foundation laid. I thought myself counsel was directing the witness' attention to a day prior to

(Testimony of Clyde W. Henry.)

the fire. It might have been a week or ten days prior thereto.

Mr. Miller: Q. Then it is your testimony that on or about April 1, 1943 you sent Mr. Sanchez down to the Ice Palace to remove the machinery and equipment from the engine room; is that correct?

A. That is not correct. I sent Mr. Sanchez about April 1 to get a pipe out of the Ice Palace.

Q. Did you ever send Mr. Sanchez down to take anything out of [68] the engine room?

A. No.

Q. Did you ever send Mr. McGrew down to take anything out of the engine room? A. No.

Q. Did you ever make any arangement with Mr. McGrew to remove the tank from the engine room?

A. I will have to answer that question by explaining the circumstances.

Q. Well, explain the circumstances.

A. During Mr. McGrew's employment by myself in drilling these wells he told me he was having difficulty in obtaining steel to make the well casing, and I told him that I owned this tank which was at that time in the engine room at the Ice Palace and that he might use that.

Q. Did you tell him to go there and get it?

A. I did not tell him to go there and get it, but I inferred by telling him that I owned it that it could be obtained there.

Q. You say that you told him it was your prop-

(Testimony of Clyde W. Henry.)

erty, he was working for you, and you told him he could go and get it?

A. Yes, he was welcome to go and get it.

The Court: Is there any dispute about any of these facts that some of the defendants went down there and were getting this pipe? Are we going to have that disputed, or is that something that is not disputed? Counsel is taking a long time to get to the point.

Mr. Getz: We are now reaching a very important point, your Honor, upon which the question of liability or possibility [69] of negligence will hinge, one of the points on which counsel will rely. This testimony is very material and is hotly contested.

The Court: I was going to find out whether the facts as to what actually took place were in dispute. I don't know at this point whether it is a question of law that you gentlemen are going to present.

Mr. Getz: I think a question of fact is also involved.

The Court: All right. Proceed.

Mr. Miller: Q. Perhaps, Mr. Henry, I may be able to refresh your memory on some of these points. You will recall that on June 14, 1944 your deposition was taken and that there were certain questions asked you by Mr. Williamson, who is of counsel for Lawrence Warehouse Company. He asked you:

"Q. Do you know Mr. McGrew?"

and you answered:

"Yes, sir."

(Testimony of Clyde W. Henry.)

Mr. Glicksberg: Can't you show him the deposition? What page is that?

The Court: Just tell him the page.

Mr. Miller: Page 12, top of the page. The next question is: "Did you do anything—were you instrumental in having them go to the building for any purpose?" and your answer was, "Yes."

The next question was: "And for what purpose?" and your answer was: "I had Mr. McGrew go to the building for the [70] purpose of getting out some sheet steel."

The next question was: "And where was that sheet steel?" and your answer was, "It was the sheet steel in the tank that was in the engine room."

The next question was: "It was a part of the sides of that brine tank?" and your question was, "Yes, sir."

Q. Do you recall that?

A. I recall that very well.

The Court: Did he give that testimony?

Mr. Miller: Q. Did you give that testimony?

A. Yes, I did.

Q. I will ask you now, Did you send Mr. McGrew to the Ice Palace to remove that steel tank in April 1943 or any time?

A. No, I did not send him there at that time. I explained how, I told him that I owned that there, and it was left to his own judgment as to whether he would go and get it. In fact, my memory has been refreshed by talking with Mr. McGrew and Mr. Sanchez since this case was brought, and at the

(Testimony of Clyde W. Henry.)

time of that deposition I was pretty cold on it, because I have an awful lot of things to attend to.

Q. But you did at the time of this deposition give these answers that I read to the questions that I read? A. That is correct.

Q. Did you know that Mr. McGrew was going down to the Ice Palace to take out this tank?

A. I thought he might—that sometime when he needed that steel he would go and get it. [71]

Q. Did you know that Mr. Elmore, who you say was employed by you at that time, would go with him? A. No.

Q. Did you know that Mr. Elmore was helping Mr. McGrew take the tank out of this building?

A. No, not at the time. I learned later.

Q. The work that Mr. McGrew was doing for you at this time, in the latter part of March and first part of April 1943, what was that work?

A. He was drilling a well.

Q. How was he to be compensated for that work?

A. On an hourly basis.

Q. How much per hour were you paying him?

A. $4.

Q. Again to refresh your memory, I call your attention to page 13 of your deposition—going back first to the bottom of page 12, you were asked: "You had contracted with him for that?"—that is referring to the drilling of wells—and your answer was—. I will withdraw that question.

You were asked: "Now, this Mr. McGrew that you speak of—he is a man engaged in business in

(Testimony of Clyde W. Henry.)

Sacramento? He has a plant there?" and your answer was, "Yes, sir." You were then asked: "A man that does well work and other things of that kind?" and your answer was, "He is a well contractor."

You were then asked if he was a responsible man, and you said, "Yes, sir; I have found him very responsible."

You then said in answer to a question put to you on page 12 of the deposition—— [72]

Mr. Hughes: Why not read it all?

Mr. Miller: All right, I will read it all.

The next question was, "And you had arranged with him or employed him to go to the building to take out the portions of that steel brine tank?" and your answer was, "I had not employed him for that."

The next question was, "You had contracted with him for that? Just tell us in your own way how he came to go." And you answer was, "That is, to give you the facts of it?"

"Q. That is right.

A. Since I acquired the water works in west Sacramento he has contracted all of my well work.

Q. Yes?

A. And up until this time he had contracted on a per foot basis.

Q. In drilling your wells?

A. Yes, sir, also in casing them.

Q. Yes.

A. And previously to this time, I would say

(Testimony of Clyde W. Henry.)

possibly five or six months, he had a new idea on a gravel envelope well that he wanted to put into force, and asked me to change his method of compensation of his contract; instead of paying him so much a foot, he would like to get $1 an hour, and it was changed at that time, so——

Q. He furnished the equipment?

A. Yes, sir, he furnished all his equipment; and so it was perfectly all [73] right with me.

Q. Well, how did he come——

A. And so I told him to get this steel or to go after this steel in the engine room. We couldn't obtain any steel for wells, and I told him that steel——"

Q. Do you remember giving that answer?

A. Yes.

Q. And the testimony that I have read, do you remember giving that testimony?

A. Yes, I remember it.

Q. The next question was:

"That was due to priorities?

A. That was due to priorities. I told him that that steel was my property and Mr. Parella's property and that I would get permission from Mr. Parella for his part, and that we could use it, and so he went over there to get the steel."

Mr. Hughes: In the original there is a correction. It was not Mr. Parella's property.

Mr. Miller: I will pass that question and move to the next one.

"Q. And when you say 'he went over there', he went over to this building?

(Testimony of Clyde W. Henry.)

A. Yes, sir, to the engine room."

Q. Do you recall that?

A. I recall those questions and answers, yes.

Q. Do you recall this question and answer:

"Q. And then what transpired?

A. Well, to the best of my knowledge, the first time he didn't get it." [74]

Mr. Glicksberg: I do not like to object, but what is the purpose of reading the deposition? Is it by way of impeachment?

Mr. Miller: I certainly think so, because he testified previously he never gave permission for this man to go there, and he said on his deposition he did.

Mr. Glicksberg: I have no objection if it is only by way of impeachment.

Mr. Miller: I am trying to refresh his memory.

The Court: I will allow it. Go ahead.

Mr. Hughes: We now understand you are impeaching the witness.

The Court: It does not make any difference to me what he doing. The witness was reluctant about answering the question before, and now counsel is bringing out what he said in the deposition. It does not make any difference to the Court whether you call it impeachment or refreshing his memory. All I am interested in is finding out what the facts are. Go ahead.

Mr. Miller: Q. Then you were asked what transpired, and your answer was, "Well, to the best of my knowledge, the first time he didn't get

(Testimony of Clyde W. Henry.)

it, and he told me that he would have to get permission to get in there, and I applied for permission. I don't just remember how I did apply for permission—whether Mr. Sanchez applied for me, or whether I applied, but, anyhow——" [75]

Do you remember that question and answer?

A. I remember those questions and answers very well.

Q. And the next question: "To whom?" and your answer was, "To some man, I believe Mr. Kenyon—isn't it Mr. Kenyon?"

Q. Do you remember that question and answer?

A. Yes.

Q. The next question was: "Mr. Gordon Kenyon?" and your answer was, "I believe that the application was made to him."

"Q. Of the Capitol Chevrolet Company?

A. Yes, sir. I have never met Mr. Kenyon, so I can't say, but I know that permission was granted by Mr. Kenyon to enter the engine room."

Do you recall that question and answer?

A. Yes.

Q. That was the answer you gave?

A. That was the answer I gave at that time, that is right.

Q. The next question was, "Yes. Was that a written permission or a verbal permission?"

"A. I believe it was written."

"Q. Then after that—it was after that that Mr. McGrew went to work in the building to take this steel out? A. Yes, sir.

(Testimony of Clyde W. Henry.)

"Q. And with whom—did he have anyone working with him?

"A. Well, that I couldn't tell you. I learned later that he did have someone working with him.

"Q. Who, do you know?

"A. He took one of my men him.

"Q. Mr. Elmore? A. I believe so."

Do you recall those questions and answers?

A. Yes. [76]

Q. And those were answers that you gave?

A. Yes, sir.

Q. I will ask you now if the answers which I have read here and which you have admitted giving to the questions I have read, if those were the facts.

A. When you speak of the facts, if you would like me to tell you the story so that his Honor and yourself can understand it, I would be very glad to.

Q. I would like to know—

The Court: Counsel, let us not get into an argument. The only question the witness is asked is whether or not those are the true facts.

Mr. Miller: Q. Whether or not those answers were correct—are they the true facts, and those answers correct?

A. It is too technical. If I could tell it my own way you would understand why I said Yes and No to certain answers, if you understood the arrangement this property is run under.

Q. What was the arrangement?

A. The answers that I gave in this deposition are information that I had received from my super-

(Testimony of Clyde W. Henry.)

intendent, Mr. Sanchez, and I gave those as facts, because he had told them to me. So far as my giving either Mr. Sanchez or Mr. McGrew specific instructions to go and see some person, I did not give those specific instructions, and when you asked me if I asked Mr. Gordon Kenyon for permission to go in that Ice Palace, I did not. However, in conversation with Mr. Sanchez I understand that he went to Mr. Kenyon, whatever Mr. Kenyon was that had authority to give permission, and he [77] received permission for Mr. McGrew to go in and get this tank out. Does than answer your question?

Mr. Wallace: Now I move that that answer go out as pure hearsay.

Mr. Getz: I join in that motion, because he cannot testify to something that Mr. Sanchez told him and bind us. It has no place in the record, and we move to strike it as immaterial, irrelevant and incompetent and hearsay and highly improper.

The Court: Of course, the question called somewhat for an explanation from the witness. I will allow the answer to stand. I imagine that you gentlemen will clear up the point as to whether or not someone got permission from Mr. Kenyon to go in there.

Mr. Getz: It is a highly technical point.

The Court: I do not think it is so technical. It is a simple question of fact. I suppose there will be some more evidence on that.

Mr. Getz: Yes.

Mr. Miller: Q. I will call your attention again

(Testimony of Clyde W. Henry.)

to the note that you identified reading: "Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment." I will ask you again if that authorization was written by you.

A. Yes, it was.

Q. And was that for the purpose of Mr. Sanchez going to the [78] Ice Palace to remove the machinery and equipment from the engine room?

A. I answered that once before, but I will be glad to answer it again. That was given a week previous, at least a week previous, to this April 9, but it was given to Mr. Sanchez to give the watchman at the Ice House to take out approximately 80 feet of 12-inch casing that was in there that we wanted, but it had nothing whatever to do with the getting out of this brine tank.

Q. So it is now your testimony that you never sent anyone there to take the brine tank out?

A. That is very technical. You are trying to confuse me. I explained that at quite some length and I will be glad to explain it again.

The Court: I think I understand the testimony. We do not have to go over it again. We will take a recess at this time for a few minutes.

(Recess.)

Mr. Miller: Q. Were you ever in the engine room at the Ice Palace? A. At which time?

Q. Were you ever in the engine room?

A. Oh, yes.

Q. Do you recall the last time that you were in the engine room prior to the fire of April 1943?

(Testimony of Clyde W. Henry.)

A. Well, it would be awfully hard to recall, but as near as I can remember, I was probably in there a week or two, or two or three weeks previous to that time.

Q. The last time that you were in there, can you tell us the [79] condition of that room, what machinery was there, and what the condition of it was?

A. Well, as far as I can remember, this brine tank that you have referred to was there partly dismantled, some compressors, some 12-inch pipe. I am not sure yet whether compressors had been removed first or the 12-inch pipe, and I believe some valves, and the tank.

Q. Was there any oil or grease on the floor at that time, do you recall? A. No.

Q. You answer was "No"?

A. That is right.

Q. Was there any debris or waste of any kind on the floor? A. No.

Q. Was the tank in its original position at that time? A. Yes.

Q. It had not been moved off the floor at that time, is that correct?

A. I could not say whether it had been raised off the floor any or not, but I am almost positive it had not been moved out from the wall.

Q. What was under that tank? Was there anything between the tank and the cement floor?

A. Nothing that I know of.

(Testimony of Clyde W. Henry.)

Q. Was there any electrical wiring in that building? A. Yes.

Q. Was the electricity still connected into that engine room in April 1943?

A. Yes, the electricity was in that room at that time; to the best of my knowledge it was.

Mr. Miller: No further questions.

Cross-Examination

Mr. Glicksberg: Q. Just one or two questions. Mr. Henry, [80] all of these questions propounded to you by counsel pertaining to the deposition and the answers you gave therein, were they correct?

A. Well, both answers are correct, as far as I know.

Q. What do you mean by "both answers are correct"?

A. I mean if there is any variance between the answers that I gave in that deposition and the answers I gave here, they are largely technical, because after some of the technical points brought out this morning I wondered if I had given the right answers when I said as a fact in my deposition information that had been given me.

Q. But a great many of those questions were directed to your giving of a card. Did that card have anything to do with any of the subject matter of the case at the time of the fire? A. No.

Q. All of the answers which pertain to your giving of a card and permission of individuals to go in had to do with some other subject?

(Testimony of Clyde W. Henry.)

A. The card was given to Mr. Sanchez so that he could take his men and go and get a length of 12-inch pipe out of there for the use of the water company, and it had nothing whatever to do with Mr. McGrew entering the premises.

Q. And all of the answers that were read by counsel pertained to that particular card and that section of 12-inch pipe? A. That is correct.

Q. In reference to the day or two prior to the fire, did you [81] know Mr. McGrew was going on the premises?

A. I knew at some time he would go in there and get the steel. I did not know just when.

Q. Did you know he was going to go then?

A. I was not even in Sacramento then.

Mr. Glicksberg: I just wanted to correct those one or two points. We are reserving the right to put in our defense later on. No further questions.

The Court: Any other questions of the witness?

Mr. Hughes: I would like to ask two or three questions.

Q. I believe you testified, Mr. Henry, that you acquired this tank from the old Ice Palace Corporation, is that correct? A. That is correct.

Q. That was prior to you and Mr. Parella purchasing the property, the real property?

A. That is correct.

Q. And thereafter, after acquiring the property on March 1, you leased the premises to the Capitol Chevrolet Company, you and Mr. Parella?

A. Yes.

(Testimony of Clyde W. Henry.)

Q. Did you and Mr. Parella exercise any acts of ownership—I mean, not ownership, but control over the property after that, the real property?

A. Well, we leased it after that, Mr. Parella and I did.

Q. But after you leased it to Capitol Chevrolet Company did you go into the premises?

A. Did I personally go in there?

Q. Yes.

A. Yes, I went in the property, as I remember, two [82] or three times after we leased it to the Capitol Chevrolet Company.

Q. Did Mr. Parella ever go with you?

A. No.

Q. Do you know if Mr. Parella ever went in that property after it was leased?

A. No, I don't know of him ever going in there.

Q. I believe you stated that this tank was being cut up to be used in connection with a well of the West Sacramento Water Company, is that correct?

A. That is correct.

Q. You are the sole owner of the West Sacramento Water Company? A. Yes.

Q. Did you and Mr. Parella have any—or did you at the time of this fire have any business interests?

A. No, with the exception of that building.

Q. Just the ownership of the building?

A. Just the ownership of the building.

Q. You were not operating the rink or anything in connection with the building?

(Testimony of Clyde W. Henry.)

A. That is correct.

Mr. Hughes: That is all.

Mr. Clotz: Q. Mr. Henry, the Capitol Chevrolet Company had nothing whatsoever to do with the pipe or equipment of this tank, did they?

A. The Capitol Chevrolet Company?

Q. Yes. A. No.

Q. They were not engaged with you in any business transaction of any kind other than the fact that they had leased the [83] premises for storing tires, is that correct? A. That is correct.

Q. This removal of pipe or equipment was entirely a matter of your own private concern? It was not in any way connected with any transaction that you had with Capitol Chevrolet Company, is that right? A. That is correct.

Q. Capitol Chevrolet Company had no dealings of any kind, so far as you know, with Mr. McGrew?

A. I would not know about that.

Q. Nothing that you were doing or that Mr. Sanchez was doing or Mr. Elmore was doing or Mr. McGrew was doing in and about that Ice Palace was for the benefit of or on behalf of the Capitol Chevrolet Company at the time of the fire; is that correct? A. Yes.

Q. You had access to the building after you leased it, and after they had commenced to install the tires in there, for the purpose of repairing the roof, did you not?

A. I was informed by the watchman that he had a list of the names of people who were allowed

(Testimony of Clyde W. Henry.)

to go into the premises; in fact, I believe he showed it to me, that Mr. Parella and myself were two that were allowed to go in there.

Q. That was the watchman for the Defense Supplies Corporation?

A. I believe he was a watchman employed by them—he had a star.

Q. You were on that list as an eligible person and did go into [84] the premises on several occasions before the fire? A. Yes.

Mr. Getz: That is all.

Mr. Wallace: Q. Mr. Henry, you had no connection of any kind with the Lawrence Warehouse Company, did you? A. That is correct.

Q. Nor did your West Sacramento Water Company or your other business interests?

A. No.

Q. You had no business interests of any kind with the Lawrence Warehouse Company?

A. That is correct.

Q. You did not at any time make any request of or give any notice of any kind to the Lawrence Warehouse Company? A. No.

Q. You were never in touch with them at any time—you did not ask them for any permission of any sort?

A. That is correct.

Mr. Wallace: That is all.

The Court: Is that all with this witness?

Mr. Miller: That is all. I would like to call under Rule 43 Mr. Gordon Kenyon of the Capitol Chevrolet Company.

GORDON KENYON

called for the plaintiff under Rule 43(b); sworn.

The Clerk: Will you state your name to the Court, please.

A. Gordon Kenyon.

Mr. Wallace: If your Honor please, with respect to the other defendants, under Rule 43, we take the same position [85] as we did with respect to Mr. Henry, that the rule does not apply against us.

Direct Examination

Mr. Miller: Q. Are you an officer of the Capitol Chevrolet Company? A. No.

Q. Are you employed by the Capitol Chevrolet Company? A. Yes.

Q. What is your position?

A. I am assistant manager.

Q. Your offices are in Sacramento?

A. Yes.

Q. Were you assistant manager of the Capitol Chevrolet Company in April 1943? A. Yes.

Q. Do you recall, Mr. Kenyon, giving authority to anyone to go upon the premises known as the Ice Palace in west Sacramento to remove any machinery or equipment therefrom?

A. I at one time recall a Mr. McGrew asking for permission, asking me to O.K. permission to enter property, to go into the Ice Palace.

Q. Do you recall the name of the person who sent you that card?

(Testimony of Gordon Kenyon.)

A. I think the card was from Clyde Henry it was signed by Mr. Henry.

Mr. Miller: Do you happen to have the original of that card?

Mr. Getz: I have it, counsel. I will produce it in just a moment.

Mr. Miller: I wish to proceed with some questions while you are looking at it. [86]

Q. Did you know the man who presented you with that card? A. I did not.

Q. Do you remember the name of the man who came to you with the card?

A. The card showed the man's name was Mr. Sanchez.

Q. You didn't know Mr. Sanchez otherwise?

A. No.

Q. Did you instruct the guard at the Ice Palace to permit Mr. Sanchez to go into the premises and remove any equipment?

A. I think I did. I can't be positive.

The Court: Q. You mean you don't recall distinctly?

A. I don't recall distinctly, no. Let me put it this way: I do not recall how I gave him authority to go in, whether it was by telephone or by written correspondence.

Q. Either one way or the other?

A. I did it one way or the other.

By Mr. Miller:

Q. When you say "one way or the other," you

(Testimony of Gordon Kenyon.)

mean you don't recall whether it was written or oral? A. That is right.

Q. Do you know if the man went out to the Ice Palace and went into the engine-room and removed any equipment? A. Lately, you mean?

Q. After you gave him authority to enter or instructed the guard to let him enter, do you know if he went there? A. Just by hearsay.

Q. I will show you this—it is a business card of the U. S. [87] Machinery Company, and printed down in the left-hand corner, "Clyde W. Henry," and I ask you to look at the reverse side. There appears on the reverse side, "Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment. Clyde Henry." Is that the card which was presented to you?

A. Yes.

Mr. Miller: I ask that that be admitted in evidence.

Mr. Wallace: Is there any testimony as to when this card was presented to him?

Mr. Miller: I will ask him.

The Court: It may be admitted and marked.

(The card was marked Plaintiff's Exhibit No. 8 in evidence.)

By Mr. Miller:

Q. I will ask you, Mr. Kenyon, do you recall when that card was presented to you?

A. I think in my deposition it was a Monday prior to the fire, prior to the date the fire happened.

(Testimony of Gordon Kenyon.)

Q. What day of the week was the fire?

A. I don't recall.

Mr. Getz: Let us be clear on that. I have a newspaper clipping of Saturday, April 10, giving the story of the fire, so April 9 must have been Friday.

The Court: Q. It was the Monday before Friday, April 9?

A. Yes.

By Mr. Miller:

Q. To the best of your recollection, it was Monday before that Friday that you either called or notified the watchman to let these people in pursuant to this card that [88] you received from Mr. Henry, is that correct?

A. That is right.

Q. After you had made arrangements with the guard to let these men go on the premises, did you attempt to find out or did you go out there to see what they were doing? A. No.

Q. So that as far as you know, do you know they went out and got into the premises?

A. Just by hearsay.

Q. When you say "by hearsay," what do you mean? A. By a report from my foreman.

Q. Did your foreman report to you that they went in?

A. The foreman told me that they went in and tried to get through to the engine room, so-called, and they were unable to, and they went out of the building.

(Testimony of Gordon Kenyon.)

Q. What day was that, do you recall?

A. I don't recall.

Q. That was after you had given them authority to go out there? A. Yes.

Q. At any later time did your foreman report as to any work they were doing?

A. I don't know.

Q. When did you first learn that these men had gone out and started to remove a brine tank from the engine room?

Mr. Wallace: I do not want to object—

Mr. Miller: The card is there. Refer to it. It says "pipe and equipment."

Mr. Wallace: There is not any evidence, as I understand it, yet that the men referred to on this card are the men even [89] that went into the engine room, and if I understood Mr. Henry's testimony, it was that they were not the same men. I don't know whether there were two sets of men or not, but apparently the evidence today would indicate there were.

The Court: Is there an objection?

Mr. Miller: I will withdraw that question and restate it, and maybe we can get the facts.

Q. Did your foreman report to you that any men were removing machinery or equipment from the engine room? A. I don't recall.

Q. You don't recall? A. I don't recall.

Q. You did not, of course, supervise any of this work of removing pipe or machinery or equipment, did you? A. That is right.

(Testimony of Gordon Kenyon.)

Q. Did you get permission from Defense Supplies Corporation or any representative of Defense Supplies Corporation to authorize the guards to let anyone go on its premises to remove machinery or equipment?

Mr. Wallace: Just a moment. I will object to the question on the ground that it includes the words "representative of Defense Supplies Corporation." There is a legal question as to who were representatives of Defense Supplies Corporation.

By Mr. Miller:

Q. Let me put this way: Did you get permission from anyone before you authorized these men to go into the premises?

Mr. Getz: Just a minute—very well. Let him answer the [90] question, and I will bring it out on cross-examination.

A. When Mr. Sanchez presented the card, I called a Mr. Turner of the West Sacramento Land Company and asked him——

Mr. Glicksberg: I am going to object to that as absolutely hearsay so far as my defendant is concorned. I have had no objection to his testimony as to Mr. Sanchez, but I object to his testimony as to Mr. Turner.

The Court: I don't know what this man is.

By Mr. Miller:

Q. Who is Mr. Turner?

A. Mr. Turner is a real estate man in West Sacramento. He was the man that we dealt with

(Testimony of Gordon Kenyon.)

mostly for the leasing of the Ice Palace. He was the representative of the owners.

Q. Why did you call him?

A. He was the man that we dealt with.

Mr. Glicksberg: We are going to object to that as immaterial, irrelevant and incompetent and hearsay.

The Court: You called up Mr. Turner, and as a result of that did you get in touch with anybody else?

A. No, I first got in touch with Mr. Turner, who we arranged the Ice Palace deal with.

Q. You talked with no one else except him?

A. That is right.

By Mr. Miller:

Q. Mr. Kenyon, do you recall receiving a letter addressed to you in care of Capitol Chevrolet Company dated January 22, 1943?

Mr. Getz: I will stipulate that the original of it was [91] received and that you may use a copy.

Mr. Miller: I will ask that the copy go in as Plaintiff's exhibit next in order.

The Court: All right.

(The letter was marked Plaintiff's Exhibit 9 in evidence.)

The Court: What does the letter say?

Mr. Miller: I will show it to him.

The Court: You don't have to show it to him. It is already in evidence.

Mr. Miller: I would like to read from it. This

(Testimony of Gordon Kenyon.)

is a letter addressed to Gordon Kenyon, care of Capitol Chevrolet Company, 1300 K Street, Sacramento, California.

"Dear Mr. Kenyon:

"You are requested not to permit anyone to enter the warehouse premises where tires are stored for account of this corporation for any reason whatsoever, other than authorized appraisers or properly identified employees of this corporation.

In the near future, however, you may be called upon by a representative of the Rubber Manufacturers Association of America, Inc., which organization is to handle the distribution of the tires acquired by us, and upon proper identification from such representative entrance to the warehouse and examination of any tires may be permitted. Your strict observance of the above will be [92] appreciated.

Very truly yours,

F. J. Titgen, Agent."

Q. Do you recall receiving that letter?

A. I believe I do, yes.

Mr. Miller: That is all.

Cross-Examination

By Mr. Getz:

Q. Mr. Kenyon, at the time that this letter was written, January 22, 1943, had any negotiations been entered into for the leasing of the warehouse?

(Testimony of Gordon Kenyon.)

A. No.

Q. After the Ice Palace was leased was any person other than the ones mentioned here authorized to enter any of the buildings by the Defense Supplies Corporation?

A. Not other than the list that we had agreed on.

Q. You had agreed upon a list with someone from the Defense Supplies Corporation?

A. Mr. Baxter and Mr. Anderson.

Q. Mr. Baxter was the field representative for the Defense Supplies Corporation, and your contact with the Defense Supplies Corporation in obtaining the Ice Palace, the leasing of it? A. Yes.

Q. And did that list include Mr. Henry and Mr. Parella? A. Yes, it did.

Q. Did it also include names of other persons who were entitled to go in these for the purpose of handling tires and stacking them?

A. It had a list of our tire stackers and sorters. [93]

Q. Did the Defense Supplies Corporation also place guards in that palace?

A. There were guards placed there by the Lawrence Warehouse Company.

Q. Were they allowed to enter the Ice Palace?

A. The guards were allowed to, yes.

Q. And as part of the lease that you entered into with Mr. Henry was he not required to enter for the purpose of making repairs to the roof?

(Testimony of Gordon Kenyon.)

Mr. Miller: We are going to object to that, as the lease speaks for itself.

By Mr. Getz:

Q. Did he enter to make repairs after the lease was executed and after you started to put tires in?

A. I am sure he did not make the repairs. I could not say whether he entered.

Q. Those repairs were not made?

A. No.

Q. At the time that card was handed to you, was anything whatsoever said to you about any brine tank? A. No.

Q. Did you know anything about any brine tank? A. No.

Q. Did you ever know anything about a brine tank until after this fire? A. I did not.

Q. Did you ever know or have any reason to believe that they would enter the engine room for the purpose of using an acetylene torch or any kind of a torch in there?

A. The card read "pipe and equipment," and the pipe was in the main building, and there was also equipment such as barrels [94] —small equipment.

Q. Did that require any torch or any use of an acetylene torch for the purpose of removing it?

A. There was no torch or anything mentioned about a torch to me in any way.

Q. Did you ever hear of Mr. McGrew prior to the time of the fire? A. I did not.

Q. Had you had any dealings with him?

(Testimony of Gordon Kenyon.)

A. No.

Q. Or authorized Mr. McGrew to enter into the building? A. I did not.

Q. You said that the foreman informed you that they could not get into the engine room. Wasn't that because the tires were stacked against that door between the main building and the engine room? A. That is correct.

Q. Were there any tires stored in the engine room? A. No.

Q. There was never any intention of storing any tires in the engine room? A. No.

Mr. Getz: That is all.

The Court: Is there anything else?

By Mr. Glicksberg:

Q. With respect to that card which was introduced in evidence here as Plaintiff's Exhibit 8, I think on direct examination you testified that it was given to you Monday prior to the day of the fire. How do you recall that date?

A. I really cannot recall, but I think there was some reason for my remembering it was on a Monday.

Q. Do you know Mr. Sanchez?

A. No. [95]

Q. Would you be able to recognize him if you saw him?

A. Somebody told me he was in court here.

Mr. Glicksberg: Mr. Sanchez, will you stand up?

Q. Do you recognize him now?

A. No, I can't say that I do.

(Testimony of Gordon Kenyon.)

Q. You don't know of your own knowledge whether that card was given to you the week of the fire or the Monday prior to the fire?

A. It was given to me on a Monday before the Friday of the fire—there was about four days elapsed.

Q. I am asking you, how do you know it was four days or ten days?

A. I could not tell you right now, but there was a reason for it someplace.

Q. What is the reason? A. I don't know.

Q. Then it might as well be ten days before the fire?

A. No, it could not have been. I don't recall the day.

Q. You don't know? A. No.

By Mr. Hughes:

Q. Just one question, Mr. Kenyon: Do you know Mr. Parella? A. Yes.

Q. Do you know of Mr. Parella ever having entered the Ice Palace premises after making this lease of March 1, 1942?

A. I think I met Mr. Parella at the Ice Palace after the lease was signed.

Q. You met him at the Ice Palace?

A. Yes.

Q. But did you ever see him enter the premises or use any authority there at any time?

A. No; he and I just discussed the running of it for fifteen or twenty minutes, and that is all. [96]

(Testimony of Gordon Kenyon.)

Q. Was that in connection with the renting of it?

A. No, it was after it was rented, I think, if I recall correctly.

Q. Do you know of his exercising any act of possession of the premises in any way?

A. No.

Mr. Hughes: That is all.

Redirect Examination

By Mr. Miller:

Q. You have testified that there was a list of persons who were authorized to go upon the premises. Do you have that list?

Mr. Getz: I have it, counsel, and will produce it.

Mr. Miller: I will ask the witness a couple of more questions, while you are looking for that.

Q. Had you ever inspected the engine room before the fire?

A. Yes, you might say it was an inspection. I was in there once or twice.

Q. What was the reason for going in there? Did you go in to see if it was suitable for the storage of tires?

A. I presume that was the reason, However, it was something we were leasing, and naturally we would want to see it all.

Q. Was there some machinery and equipment in that room when you examined it?

A. Yes, what they called a tank.

Q. Was it a large tank?

(Testimony of Gordon Kenyon.)

A. Well, it did not look like a tank to me. There were only three sides to it, and the other side was lying in the middle of the floor, catercorner or [97] crosswise on the floor.

Q. The other side had been cut off?

A. The front had been cut off, and most of it still on the floor.

Q. Did you observe the condition of the floor?

A. So much as you could with this material laying on the floor.

Q. Did you see any grease or oil on the floor?

A. No.

Q. Did you notice what the tank was sitting on? Was it sitting on the floor?

A. I would say that it was resting on something, but what is was resting on, I don't know.

Q. You said in answer to a question that you did not intend to store any tires in the engine room. Was there any reason for that?

A. You could not get them in—it would have taken at least four men or six men to handle the plates that were lying on the floor and the plates were not lying level; it was lying catercorner across the floor, with one end raised up and one lowered: in other words, there was no room to carry them in.

Q. I will show you a piece of paper on which appears a list of names, and ask you if that is the list of persons who were authorized by Defense Supplies Corporation to go upon the premises, the warehouse rooms of the Ice Palace.

A. I would say it was.

(Testimony of Gordon Kenyon.)

Q. Is that the list?

A. There may have been changes in the group of men listed here.

By Mr. Getz:

Q. Which group do you refer to?

A. The [98] pilers. They moved in and out.

Q. In other words, it would be your testimony that the list of tire pilers was subject to change because men would leave the work and other men would go to work? A. Yes.

By Mr. Miller:

Q. But with that exception those were the persons authorized by the Defense Supplies Corporation to go upon the premises?

A. I would say that is correct.

Q. To your knowledge did the names of Mr. McGrew, Mr. Elmore or Mr. Sanchez ever appear on that list at any time? A. No.

Mr. Miller: I will ask that this go in as plaintiff's exhibit next in order.

(The list was marked Plaintiff's Exhibit 10 in evidence.)

The Court: Anything further with this witness?

Mr. Miller: I have no further questions.

Mr. Getz: No questions.

Mr. Wallace: No further questions.

Mr. Miller: I would now like to call under Rule 43 Mr. James Kenyon of the Capitol Chevrolet Company.

Mr. Wallace: We make the same statement as

to Mr. Kenyon's testimony as to that of Mr. Gordon Kenyon and Mr. Henry.

JAMES A. KENYON

called for the plaintiff under Rule 43(b); sworn.

The Clerk: Will you state your name to the Court, please.

A. James A. Kenyon. [99]

Direct Examination

By Mr. Miller:

Q. Will you speak out loud, Mr. Kenyon; you are quite a ways away from us?

A. I will.

Q. Are you an officer of the Capitol Chevrolet Company, Mr. Kenyon?

A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

Q. You are the owner of the Capitol Chevrolet Company? A. Yes.

Mr. Getz: It was a corporation and was dissolved.

By Mr. Miller:

Q. Were you president of the company?

A. Yes. We did not dissolve until May 31.

Q. Do you recall entering into an agreement with Lawrence Warehouse Company for the storage of tires? A. Yes.

(Testimony of James A. Kenyon.)

Q. Have you a copy of that agreement or have you the original agreement?

Mr. Getz: No, the original is attached to the deposition.

By Mr. Miller:

Q. I will show you a document that is entitled "Agency Agreement with Government Custodian," which bears the date of October 1, 1942, between Lawrence Warehouse Company and Capitol Chevrolet Company, and I will ask you if that is your signature which appears at the bottom of the document. A. Yes.

The Court: Do you want to offer that in evidence?

Mr. Miller: I am going to offer this in evidence.

Mr. Getz: No objection. [100]

The Court: It may be admitted and marked.

(The agreement was marked Plaintiff's Exhibit 11 in evidence.)

By Mr. Miller:

Q. Mr. Kenyon, were you in Sacramento at the time of the fire at the Ice Palace in April 1943?

A. I was.

Q. Do you recall following that fire making a written report with respect thereto to the Defense Supplies Corporation? A. Yes.

Mr. Glicksberg: I am going to object to it.

The Court: It may be admitted as against the defendant who wrote it.

(Testimony of James A. Kenyon.)

Mr. Getz: Insofar as Capitol Chevrolet is concerned, we make the objection on the ground it appears on the face of the report that none of the information that he is reporting he knew of his own knowledge, but mere information he gathered from different ones and strictly hearsay, and it is not anything of his own knowledge, and it is valueless. It is merely statements of various persons interviewed.

The Court: There may be admissions, I don't know, of course, it would not be admissible against the other defendants.

Mr. Getz: It would be admissible only as against the Capitol Chevrolet, but, as I say, it appears upon its face that it is hearsay.

The Court: That would go to the weight of the matter rather than to the admissibility of it. [101]

Mr. Getz: That is correct.

The Court: Do you wish to offer it in evidence?

Mr. Miller: I am going to offer it in evidence.

The Court: I will admit it in evidence as against the defendant Capitol Chevrolet Company.

(The report was marked Plaintiff's Exhibit 12 in evidence.)

Mr. Miller: I have no further questions.

Cross-Examination

By Mr. Getz:

Q. Do you know any of the facts stated in that report of your own knowledge? Do you know what I mean by "from your own knowledge"?

(Testimony of James A. Kenyon.)

A. Yes, I understand. I was told of the facts that were in the report—I can't remember what was written something over a year ago.

The Court: You had better read it.

By Mr. Getz:

Q. Mr. Kenyon, by your own knowledge I mean that which you saw with your own eyes or observed or learned from your own knowledge, as contra-distinguished from what somebody else told you. Were you there at the time of the fire?

A. I was in Sacramento.

Q. But were you at the fire?

A. Yes, I was.

Q. How long after it had happened?

A. The fire started at 12:30 and I was there by 1:30.

Q. As to any other facts that you referred to in this report, are those things that you saw—were those matters that you were told by various persons whom you talked to or saw? [102]

A. Again I notice you are asking about something that I don't remember as to what it says.

Q. Very well, I will show it to you.

A. What is the question?

Q. Whether the matters stated in this report were matters that you knew of your own knowledge or were merely matters that you obtained from various sources.

A. It was only information that I gathered from other sources.

The Court: Of course, it is evident from reading

(Testimony of James A. Kenyon.)

it it is merely a compilation of everything that the witness had learned from others.

Mr. Getz: That is correct.

Q. Did you afterward check some of the information that was in this report as to its correctness?

A. The day after the fire I went to a hospital in San Francisco and was not back in Sacramento for over two weeks, and this report was filed at the request of Mr. McKee and Mr. Baxter of the Defense Supplies Corporation from what I had gathered from the different employees, and to the best of my recollection it is what they advised me.

Mr. Getz: That is all.

The Court: Anything further?

Mr. Miller: I have just one question. I notice the name of Mr. Gerhart. What is Mr. Gerhart?

A. He was the supervising foreman of the tire pilers.

Q. Was he employed by the Capitol Chevrolet Company? A. Yes. [103]

Mr. Miller: No further questions.

The Court: We will take an adjournment now until tomorrow at ten a. m.

(Thereupon an adjournment was taken until Wednesday, February 14, 1945, at 10:00 a. m.)

Wednesday, February 14, 1945, 10 a.m.

The Clerk: Defense Supplies Corporation against Lawrence Warehouse Company.

Mr. Miller: Ready.

Mr. Wallace: Ready.

WILLIAM C. HANLEY,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please.

A. William C. Hanley.

Direct Examination

Mr. Lombardi: Q. Mr. Hanley, what is your occupation? A. Warehouseman.

Q. Are you employed by the Lawrence Warehouse Company? A. I am.

Q. What is your position with that company?

A. Vice president.

Q. Were you vice president of the Lawrence Warehouse Company in January, 1943, and April, 1943?

A. I think I was assistant vice president.

Q. At that time? A. Yes.

Q. I will show you a copy of a letter addressed to you from Mr. Titgen of the Defense Supplies Corporation dated January 22, 1943, and I will ask you if you received the original of that letter. [104]

Mr. Wallace: If that is the letter you have just handed me a copy of, we will stipulate it is.

Mr. Lombardi: We wish to introduce this letter as plaintiff's exhibit next in order.

(Testimony of William C. Hanley.)

Mr. Glicksberg: I don't know whether we should object at this time. We have no objection to its introduction except that it is immaterial as to the defendant Clyde Henry.

The Court: Is this the same letter that was sent to the Capitol Chevrolet Company that you read?

Mr. Getz: The substance is the same.

Mr. Lombardi: Yes.

The Court: It may be admitted and marked.

(The letter was marked Plaintiff's Exhibit 13 in evidence.)

Mr. Lombardi: We wish to call Mr. McGrew under Rule 43.

V. J. McGREW,

called for the plaintiff under Rule 43(b); sworn.

The Clerk: Please state your name to the Court.

A. V. J. McGrew.

Direct Examination

Mr. Lombardi: Q. What is your occupation, Mr. McGrew?

A. I am a water well drilling contractor.

Q. A water well drilling contractor?

A. That is right.

Mr. Wallace: If your Honor please, I would like to make the same objection to this testimony as I did to the other [105] witnesses called under Rule

(Testimony of V. J. McGrew.)

43, to the effect that that rule applies only as to that defendant.

Mr. Lombardi: Q. Do you live in Sacramento?

A. I live in North Sacramento.

Q. Were you a well drilling contractor in April 1943? Was that your business then?

A. Yes.

Q. Are you familiar with the Ice Palace at West Sacramento?

A. Well, I know where it is, yes.

Q. Were you at the Ice Palace in April, 1943, at the time it was burned? A. Yes.

Q. What were you doing there at that time?

A. I was engaged in dismantling a brine tank; I was engaged in taking apart a brine tank.

Q. When did you start work there for that purpose?

A. It was the day before the fire; that was the 9th; it was the 8th.

Q. On the 8th of April, the day before the fire?

A. Yes.

Q. And from that time until the time of the fire were you engaged in that work? A. Yes.

Q. Do you know Mr. Clyde Henry?

A. Yes.

Q. Did Mr. Clyde Henry send you to the Ice Palace for the purpose of doing that work?

A. You mean did he personally tell me to go over there, direct me?

Q. Yes, did he instruct you to go over there for that work?

(Testimony of V. J. McGrew.)

A. I don't know how to put that. My understanding is that he [106] owned the tank and I was to use it if I needed it.

Q. You knew that he owned the tank?

A. Yes.

The Court: Q. You would not have gone there to do this work unless somebody told you to go there?

A. I was told I could use it if I needed it.

Mr. Lombardi: Q. What was the purpose of doing this work?

A. I was engaged in drilling a well for Mr. Henry, and in drilling that well we needed some steel casing, and we had to have flat iron to make it out of; we could not get a priority on account of the war, we could not get any new liners, and that was where the tank came in, because it had steel plates.

Q. Were you going to use the steel plates that were being removed from the brine tank for the purpose of this well? A. That is right, yes.

Q. And that well was owned by Mr. Henry, is that correct? A. Yes.

Q. Were you employed by Mr. Henry for the purpose of taking out this tank and this sheet steel from the brine tank and putting it in the well?

Mr. Glicksberg: I am going to object to that as calling for the conclusion of the witness. It calls for a legal determination, that is, as to the question of employment between Henry and McGrew.

(Testimony of V. J. McGrew.)

The Court: Why don't you ask him what arrangements they had? [107]

Mr. Lombardi: Q. Mr. McGrew, will you state what your relation was with Mr. Henry in connection with this work you were doing at the Ice Palace?

Mr. Glicksberg: That is objected to as calling for the conclusion of the witness.

The Court: I did not intend you to use my exact language. Find out whether he had a written contract or otherwise.

Mr. Lombardi: Q. Was Mr. Henry paying you for this work?

A. I was being paid to drill the well.

Mr. Glicksberg: The same objection.

Mr. Lombardi: Q. The question, was who was paying you? A. Mr. Henry.

Q. On what terms was he paying you? That is, was he paying you a salary or on an hourly or a weekly basis, or what was the basis?

A. I was being paid on the number of hours that I put in.

Q. A certain amount per hour, is that right?

A. Yes.

The Court: Q. Did you charge him for the time you spent in cutting this tank?

A. Yes, I did.

Mr. Lombardi: Q. Now, at the time you first started work at the Ice Palace on this particular job, who did you have with you to assist you in the work? A. I had Mr. Elmore.

(Testimony of V. J. McGrew.)

Q. Did anybody else come with you at the time you went to the Ice Palace?

A. I either went to the Ice Palace with Mr. Sanchez or I followed him over. It might have been that he [108] might have driven over in his own car and I drove over myself.

Q. Did anyone give you permission to go on the premises for the purpose of doing this work?

A. Mr. Sanchez did, yes.

Q. Mr. Sanchez? A. Yes.

Q. Do you know who Mr. Sanchez is?

A. He is manager or superintendent of the West Sacramento Water Company.

Q. When you first went to the Ice Palace to do this work, did you see any of the guards there?

A. I seen them, but I didn't talk to them.

Q. Did the guards permit you to go on the premises? A. They did not stop me.

Q. Had you gone to the Ice Palace for the purpose of starting this work prior to April 8, 1943?

A. I believe we were over there twice, yes.

Q. You were there?

A. I was there, yes.

Q. What did you do at that time?

A. I did not do anything at that time. I believe Mr. Sanchez talked to the guard, and the guard required additional information or additional authority.

Q. When was that?

A. That was, I think, the day before; that would be the 7th.

(Testimony of V. J. McGrew.)

Q. Then you went to the Ice Palace, but you did not start any work at that time?

A. I did not start any work, and I do not believe I even went into the building or even close to the building. [109]

Q. When you went to the Ice Palace and started the work of removing this tank, will you tell us what equipment you had with you?

A. I had a truck and acetylene torch and cylinders and hose to operate it.

Q. You might give us a brief description of that equipment. You say you had cylinders. How many cylinders were there?

A. There is one oxygen cylinder and one acetylene.

Q. They were attached to the torch?

A. There was a hose about 20 or 25 feet long, some such matter.

Q. Oxygen and acetylene are the substances that operate the torch, is that right? A. Yes.

Q. Now, I understood you to testify that when you went first on the premises to start this work, that that was the day before the fire, that is April 8, 1943, is that correct?

A. That was the first day we did any work there.

Q. That is when you brought that equipment to the premises, is that right?

A. Well, it was on the truck; I had the truck with me to haul it around. That is always on the truck.

(Testimony of V. J. McGrew.)

Q. You brought the truck to the Ice Palace on that day? A. Well, on the 8th, yes.

Q. Did you use this equipment for the purpose of dismantling the brine tank? A. Oh, yes.

Q. Now, Mr. McGrew, we have here on the board a very rough sketch. Can you see this all right?

A. Yes.

Q. Can you see this, Mr. McGrew?

A. I can see an outline [110] there.

Q. This represents substantially the wall of the room, roughly, not drawn to scale, and this is another room adjoining. Now, this rectangular shape here is captioned "Engine Room," and a witness previously testified that was the engine room adjoining the main part of the building known as the Ice Palace, which is designated "Rink" on this sketch. Was it in this engine room that the brine tank was situated?

A. I take it that is on the south end of the building there.

Q. Yes, on this sketch the directions are marked. There is some dispute as to just what the direction was, but for the purpose of the record I think we can say this would be the east where the "E" is, and over on this side "S" for South, and this "W" for west. A. It would be southwest.

Q. The engine room is situated on the southwest corner of the main building, is that correct?

A. That is correct.

Q. In between the engine room and the main building there was a cement fire-wall, is that correct?

(Testimony of V. J. McGrew.)

A. That is right.

Q. And in the middle of that fire-wall there was a door leading from the engine room into the main building?

A. There was a door. I do not believe it was in the middle.

Q. It was through that concrete wall between the engine room and the main part of the building?

A. That is right.

Q. Was there also a door leading to the outside of the engine room? A. Yes, two doors. [111]

Q. I wonder if you could mark on this sketch just where those doors were located.

Mr. Wallace: Might we have him mark the door that went through the fire-wall?

Mr. Lombardi: Q. Will you first mark where the fire door was located?

A. I would say it was in here (indicating). These other doors were on the west side, in here, and on the southeast side there was a door there.

Q. Will you mark that door representing the fire door with an "F.D."?

A. Yes (marking).

Q. Will you mark the other two designated as doors? A. Yes.

Q. Were there any windows in the engine room?

A. There was two small windows to the south, pretty high up.

Q. On the south side?

A. On the south side.

(Testimony of V. J. McGrew.)

Q. Will you mark those windows and mark them with a "W"?

A. Now, then, there was either a string of two or three windows along here like that, in two different places, I believe—no, there could not have been.

Q. In other words, there were two windows on the west side of the engine room, but you don't remember just where they were?

A. I don't know the exact location, but I know there was a switch-box in the center.

Q. How about the east side, were there any windows there?

A. There were no windows there.

Q. Will you mark on that sketch the location of the brine tank [112] when you first went there.

A. Where I first saw it?

Q. Where you first saw it.

A. Yes (marking).

Q. By the way, can you give us a rough estimate, as accurate as you can, of the dimensions of the engine room?

A. I would say that it was about 10 feet to the top of the engine.

Q. I mean of the engine room.

A. About 25 feet wide and approximately 35 or 40 feet long.

Q. You mean 35 or 40 feet this way?

A. 25 feet across here and 35 or 40 feet this way (indicating).

Q. That is 25 feet east and west?

A. From this corner to this corner (indicating).

(Testimony of V. J. McGrew.)

Q. And 35 to 40 feet north and south?

A. Yes, as near as I could tell. I never measured it.

Q. Could you give us an idea of the dimensions of the brine tank?

A. I would say it was about 7 feet tall, about 8 feet wide, and possibly 20 feet long.

Q. Now will you show us on this sketch—perhaps you had better do it by dotted lines to distinguish it—first of all, I will withdraw that. When you started to work on this tank did you move it?

A. Yes, we moved it.

Q. Will you show on the sketch the position that you moved that tank to?

Mr. Gommo: Might I suggest for the record the fact that the brine tank as he originally found it was against the east wall. [113]

Mr. Lombardi: I thought I would put this in evidence after he has testified to it.

The Court: He has drawn it in there.

Mr. Gommo: I didn't know whether that would be offered in evidence or not.

The Witness: I guess we had better make this bigger and it will look more right. That would be the original position of the tank.

Mr. Lombardi: Q. Would you write in there, "Original position of tank"?

A. Yes (writing).

Q. When you said you would make it bigger, you were just trying to make it more to scale?

(Testimony of V. J. McGrew.)

A. Yes, I was trying to make it proportional to the size of the building.

Q. Will you put in the position of the tank after it was moved?

A. Approximately it was setting there (indicating).

Q. The dotted lines you have written there represent the position after you moved for the purpose of starting work on it, is that right?

A. Yes, that is right.

Q. I gather that you moved it away from the east wall?

A. We moved it away from the east wall.

Q. About how many feet?

A. It was about four feet on the north corner, that is, approximately four feet from the wall, and it was possibly two feet on the other end. We did not turn the other corner as much as we did that.

Q. Was this tank when you first found it sitting right on the [114] floor?

A. Apparently, yes.

Q. By the way, was there a cement floor?

A. The engine room floor was cement.

Q. What was the construction of the wall?

A. Wood.

Q. Wooden wall, except for this fire-wall, I assume?

A. Yes, this wall here was cement.

Q. How about the walls of the main building?

A. They were wood.

(Testimony of V. J. McGrew.)

Q. When you moved the tank did you raise it off the floor?

A. I raised it off the floor, yes.

Q. What did you use to raise it with?

A. I had a small Navy hoist which lifts a ton and a half.

Q. What did you rest the tank on after you raised it?

A. Either 6 x 6 or 8 x 8 blocks.

Q. What was the material that these blocks were made of? A. Wood.

Q. Where were they located—at the corners of the tank?

A. Well, they were slid under the tank.

Q. Will you put little squares there to represent about where they were?

A. I believe there was one there, one there, and one there (marking). There was a concrete obstruction setting here, and it was not necessary to put a block there.

Q. You are pointing to the west side of the tank?

A. On the west side of the tank. There was some sort of a foundation which let a compressor set off the floor about six inches, and [115] we just set the tank over onto that concrete block.

Q. You used three wooden blocks?

A. Yes.

Q. Would you just put a "B" in the center of each of those rectangles that represent the wooden blocks used to support the tank.

(Testimony of V. J. McGrew.)

A. Yes (marking).

Q. Now, before we get away from this sketch will you designate on that diagram where you were cutting the tank to get the sheet steel?

A. You mean all of the cuts that were going to be made, or what was made?

Q. What cuts were actually made by you. Can you show that?

A. It is pretty hard to show.

The Court: He probably can explain that better than he can picture it. You had better have that sketch marked so you can identify it.

Mr. Lombardi: We will introduce this as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(The sketch was marked Plaintiff's Exhibit 14 in evidence.)

Mr. Lombardi: One thing I want to bring out further:

Q. Can you show on this sketch the position of the cylinders which were attached to the torch when you were working?

A. Yes. By the way, this building is too much this way in relation to the distance here.

Q. Now you have marked two circles in the northwest corner representing the cylinders?

A. Yes. [116]

Q. They were in the northwest corner of the engine room, is that right?

A. Yes, just inside of the door.

Q. Was there any other equipment in the engine

(Testimony of V. J. McGrew.)

room while you were working there besides the tank and the cylinders and the torch?

A. There was no other machinery of any sort in there, no.

Q. Was there any fire-fighting equipment?

A. No, outside of the five-gallon bucket of water that we took in.

Q. Now, will you tell the Court just how you proceeded with your work of dismantling the tank after you arrived, after you started to work until the time of the fire.

A. Well, before the tank was moved there was an inlet or outlet pipe welded to the north end of the tank; that was cut off; we cut this off, and also on the north wall of the tank there were—I suppose you would call it baffles, to control the flow of the brine through the ammonia coils.

Q. What do you call that?

A. The baffles that run across so that you can let the brine flow through, and all the coils that were left attached to that wall of the tank; that was cut out. That was before the tank was moved. Then we moved the tank. Then we cut the north wall of the tank off.

Q. Was this done on April 8 or April 9, the day of the fire?

A. We cut the pipe and the baffles out and moved the tank on April 8.

Q. Then you proceeded cutting the tank itself on the day of the [117] fire?

A. On the 9th.

(Testimony of V. J. McGrew.)

Q. Will you describe what you did on that day.

A. We took the north wall off, we took the northeast side, cut it right off the tank.

Q. When you speak of the north you are speaking about the directions that are shown on the sketch?

A. You have got to go that way, by the sketch.

Q. I just wanted to make it clear for the record.

A. That was what was done before noon of the 9th. After I came back from lunch——

Q. What time did you come back from lunch?

A. Oh, I would say approximately 12:20, something like that, maybe a few minutes one way or the other. I left possibly about 10 minutes to 12 and only took half an hour for lunch.

Q. At the time you came back from lunch and started work, was anybody working with you?

A. No, I was alone.

Q. Will you tell us what happened then?

A. I made a cut across the bottom of that tank, a six-foot section.

Q. At the time you were doing that work did a fire start?

A. Not while I was working. I didn't see any fire, no.

Q. When did you first see a fire?

A. That was after I finished that.

Q. How long after?

A. Long enough to walk from the tank to the cylinders and take the torch back with me.

(Testimony of V. J. McGrew.)

Q. About how long in minutes would you say that was? [118]

A. Possibly a minute or maybe a minute and a half.

Q. At the time you first observed the fire did you have your torch lighted?

A. No, the torch had been out before I moved from the tank.

Q. How long after you turned the torch out did you first observe the fire?

A. I was right back where I started from.

Q. The same time, about a minute or a minute and a half? A. Yes.

Q. Where did you first observe fire?

A. Toward the south, to the south of the engine room. You see, I was in the north, in the corner at that time—I came back to the cylinders, and that put me in the north.

The Court: Q. You mean to tell me the fire started in another part of the engine room?

A. To my knowledge, I seen fire there.

Mr. Lombardi: Q. How far was the fire when you first observed it from the place where you were last cutting the tank?

A. It would be the distance, the length of the tank, less six feet from where the cut was made.

Q. In other words, you observed the fire at the south end of the tank, is that right?

A. No, the south end of the building. The tank was possibly five or six feet shorter than the building was.

(Testimony of V. J. McGrew.)

Q. That is, the south end of the tank was five or six feet from the south end of the building?

A. Yes, and the fire was [119] apparently between the tank and the side of the building.

Q. Did you see what was burning when you first saw the fire?

A. I didn't see anything burning, no.

The Court: I can't understand that.

Q. You saw a fire. Didn't you see something burning?

A. I did not. I saw smoke and flames going across there—the smoke and flames were in the air; that is all I saw.

Mr. Lombardi: Q. Where was it you first saw fire?

A. It was burning across like that.

Q. It was burning all across the width of the engine room?

A. There was smoke and flames all the way across there, this whole part was filled with smoke and flames.

Q. This whole part was filled with smoke and flames, is that right? A. Yes.

Q. Did you see any material or substance in that engine room at the time you were working there that was inflammable?

A. You mean that would burn?

Q. That would burn, yes.

A. Well, there was two wooden benches in there.

Q. Two wooden benches? A. Yes.

Q. Where were they?

(Testimony of V. J. McGrew.)

A. One was against the north wall and one against the west wall.

Q. Was the fire near those benches?

A. No.

Q. When you first observed it? A. No.

Q. How far away?

A. Well, it would be the full distance [120] of the engine room to the north wall and 10 to 15 feet on the west wall.

Q. Did you see anything else that was likely to burn in there?

A. There was nothing else in the engine room.

Q. Did you inspect the engine room pretty closely when you were working there?

A. I did. I even pried the cover off of one can that was in there to see what was in it.

Q. When was that?

A. Before we had done any work in the building at all.

Q. You inspected the engine room very closely, did you, before you saw the fire and when you were working with the torch to see if there was anything there that could burn?

A. Before we started we inspected it.

Q. You did not see anything except what you have already stated that could burn?

A. Yes.

The Court: Let me ask a question or two.

Q. You were working after you had gone out to lunch? A. Yes.

(Testimony of V. J. McGrew.)

Q. Then you shut off the torch and went back to the tanks? A. I went back to the tanks.

Q. In that instant the fire came from no place?

A. When I turned around it was there.

Q. Your torch must have come into contact with something inflammable, must it not?

A. I would not say that.

Mr. Wallace: If your Honor please, I think the witness' testimony is that he did not start the fire.

The Court: The record will show what his testimony is.

Mr. Lombardi: We are trying to get what the facts are, to see what happened.

Q. When you moved that tank and raised it off the floor, did you look under the tank to see if there was anything there?

A. Nothing came loose with the tank, no.

Q. Did you look under it?

A. I looked at the floor, yes.

Q. Underneath the tank?

A. Yes. I did not check anything in the floor.

Q. It was a cement floor, was it not?

A. Well, it was kind of painted and rusty, probably.

Q. A cement floor with some kind of surfacing material, or was it the cement itself that was painted?

A. I didn't check into the thing. I don't know.

Q. Did you see anything there underneath the tank that would be apt to catch on fire?

A. No, I did not.

(Testimony of V. J. McGrew.)

Q. Now, at the time you were working, just before you turned off the torch, when you testified you first observed a fire you were wearing goggles or a mask, were you?

A. When I finished the cut I was wearing a pair of goggles.

Q. When you were cutting the tank?

A. When I was cutting the tank.

Q. You were wearing the goggles?

A. Yes.

Q. Do those goggles have dark glasses in them?

A. Yes.

Q. They are pretty dark, aren't they?

A. Not very dark. [122] You can see all right.

Q. Isn't the purpose of those goggles so that when you are looking right at the flame it won't blind you?

A. They are primarily to protect your eyes from anything that might spatter into them.

Q. But they are also colored?

A. They are colored, yes.

Q. When you shut off the torch, you took the goggles off?

A. Yes. They were on my forehead.

Q. When you took them off you saw the fire, is that right?

A. No, not when I took them off. After I was through at the tank I raised my goggles.

Q. It was after you raised your goggles that you first saw the fire?

A. A minute or so afterward, yes.

(Testimony of V. J. McGrew.)

Q. By the way, how thick was the steel in that tank? A. It was 1/4 inch plate.

Q. As I understand, acetylene torches come in different sizes, don't they?

A. They have different sized tips for them, yes.

Q. When you say "different sized tips," what do you mean?

A. They are measured by the size of the oxygen jet.

Q. What size were you using?

A. I was using a No. 0; that is the smallest one they make.

Q. This is the smallest? A. Yes.

Q. Now, flame comes out of that tip when it is in operation, doesn't it? A. Yes. [123]

Q. And while you are cutting the steel sparks fly off the steel?

A. The purpose of the torch is for oxidizing the metal, and they come out as oxidized metal, which is red-hot.

Q. It burns the metal?

A. It could be considered as sparks, yes.

Q. And the molten metal flies off while you are cutting it?

A. It comes in a direct line, the direction that you are cutting, directly away from the torch.

Q. It flies all over the place where you are cutting?

A. As a general rule, where you are cutting.

Q. Do you know how hot that flame is when you are cutting?

(Testimony of V. J. McGrew.)

A. No, I have never seen any statistics on it.

Q. You know it is hot enough to burn the metal?

A. Yes.

Q. While you were cutting the tank and before you saw the fire, what action did you take to make sure that molten metal or that torch would not catch anything on fire?

A. I poured a couple of five-gallon buckets of water underneath the tank.

Q. How often did you do that?

A. Just the once.

Q. Just once. How long was that before you observed the fire?

A. Not over ten minutes at the most.

Q. After you observed the fire what did you do?

A. I threw a bucket of water toward the south end of the building where there might be fire, and I went out and filled that bucket and threw that bucket on it. [124]

Q. Where did you fill the bucket?

A. There was a hydrant just outside the northwest door.

Q. How far outside?

A. About two feet or so.

Q. How many times did you refill the bucket and throw it on the fire? A. Just twice.

Q. You refilled it twice? A. Yes.

Q. So you threw three buckets of water on the fire? A. Yes.

Q. Then what did you do?

(Testimony of V. J. McGrew.)

A. I ran clear around the whole building to have the watchman call the fire department.

Q. That watchman was in front of the main building, is that right, on the north side of the main building?

A. It would be the northeast side of the building.

Q. The northeast side of the main building?

A. Yes.

Q. Then what did you do?

A. I went back to the engine room again.

Q. What did you do then?

A. I went back to see if there was anything I could do. When I got back I could see my acetylene cylinder setting just inside the door, and I took this out, and I also, by the way, drove my truck back further away from the building.

Q. You drove your truck further away from the building? A. Yes.

Q. How far had the fire spread at that time

A. I would say approximately half of that room was afire.

The Court: Q. It was burning?

A. Yes.

Q. When you came back that time you just testified to, the [125] walls were burning?

A. The walls of the engine room, yes. You could see that.

Q. They were wood?

A. Yes, they were wood.

Q. The walls would burn?

A. The walls could burn.

(Testimony of V. J. McGrew.)

Q. The fire had not started on the wall?

A. I did not see it on the wall.

Mr. Lombardi: Q. Did the fire spread to the main building?

A. Not from where I seen it. I was on the west side of the building for an hour and a half or two hours, and I did not go on the other side.

Q. Did it eventually spread to the main building?

A. The main building burned down.

Q. You saw it burn down, didn't you?

A. I saw it burn down, but where it started from, I have no knowledge.

Q. You saw it burn just as you saw the engine room catch on fire, didn't you?

A. It burned, yes.

Q. Didn't the fire cross into the main building?

A. It didn't go by way of the west wall. I don't know where it went.

Mr. Glicksberg: He doesn't know where the fire started. It might have started outside of the main building or outside of the engine room. Nobody seems to know.

Mr. Lombardi: He testified where it started.

The Court: Q. Were you there at all times during the fire?

A. I was there. [126]

Q. At the time the fire department got there was the main building aflame?

A. I think that the main building was. I believe there was smoke coming out of the west windows at the time.

(Testimony of V. J. McGrew.)

Q. There is no question that this fire spread into the main building, is there?

A. If you are asking me of my own knowledge, I don't know.

Mr. Wallace: I think there is a question as to where the fire started. The engine room was on the west side. This witness could not see any of the rest of the main building except the west side.

The Court: The flames could have gone inside.

The Witness: Through a concrete wall—that is what it was there.

The Court: Proceed.

By Mr. Lombardi:

Q. Mr. McGrew, this portion of the south wall of the main building was wood, was it not?

A. Yes.

Q. Outside of the engine room?

A. Yes.

The Court: The fire could have started on the east wall of the engine room and gone to the south wall.

The Witness: I am not saying it did not. In other words, I didn't see it.

By Mr. Lombardi:

Q. In other words, you were standing on the west side? A. Yes.

The Court: Q. But did you see flames on the south wall [127] of the building?

A. No, I did not.

Q. Where did you see the smoke coming from?

(Testimony of V. J. McGrew.)

A. There was smoke in the main building on the west side. It might help your Honor if somebody showed that the wind was blowing from the northwest across there. That is something that hasn't been brought out.

By Mr. Lombardi:

Q. Mr. McGrew, at the time that you went to the Ice Palace to do this work, did you know that tires and tubes were stored in the main building?

A. Yes, I knew that.

The Court: We will take the usual morning recess at this time.

(Recess.)

By Mr. Lombardi:

Q. Mr. McGrew, was the wind blowing the day of the fire?

A. Yes, the wind was blowing that day.

Q. Was it a moderate wind or fairly heavy wind?

A. I would say it was fairly strong.

Q. From what direction was the wind blowing?

A. Well, according to the description here it was coming from the northwest.

Q. From the northwest? A. Yes.

Q. The door in the engine room, was that open?

A. The door was open, but there is also a small shed there that is not shown on that sketch.

Q. Were the windows that were in this wall open?

A. Yes, I believe the draft was out of them.

(Testimony of V. J. McGrew.)

Q. Was this door open?

A. That door was closed and locked. [128]

Q. You testified that you looked under that tank when you raised it up and did not see anything there except the concrete floor, is that right?

A. I seen that floor, but I didn't dig into it.

Q. Isn't it a fact that that tank was installed there as a brine tank on layers of pressed cork that were held together by asphaltum, and that there was asphaltum and grease under the tank on top of that? A. Not to my knowledge.

Q. I will show you a piece of pressed cork, and if I told you that came out from under that tank after the fire, would you still give the same testimony that you have given?

A. If it came out from underneath that tank, that is not very inflammable; it don't burn.

Q. Would you say that that could not have been under that tank?

A. No, I would not say that.

Q. Would you say that that tank could not have been set on cork that was covered with asphalt and tar?

A. No, I would not say that either. I did not install that tank.

Q. Was that tank level with the concrete floor when you first went in there, or was it raised above the floor?

A. It might have been raised a little bit.

Q. It might have been raised a little bit?

A. Yes, it might have been raised a little bit.

(Testimony of V. J. McGrew:)

Q. You have testified that when you first went there to work you had with you a man by the name of Elmore. Was he employed [129] by you?

A. No.

Q. Do you know who his employer was?

A. I know who told him to help me.

Q. Who told him to help you?

A. Mr. Sanchez of the West Sacramento Water Company.

Q. Is it your testimony that Mr. Sanchez told you to go in and take the tank out?

A. Yes.

Q. And he took you there and got permission for you to go in there? A. Yes.

Mr. Getz: I move to strike that answer out so that I may make an objection. In the first place, it calls for a conclusion of the witness, and assumes something not in evidence, that Mr. Sanchez got permission for him to go in there.

The Court: He asked him the question whether he did or not. I will overrule the objection.

Mr. Getz: It calls for his conclusion.

The Court: Let the answer stand. You can cross-examine him on that. I will overrule the objection.

By Mr. Lombardi:

Q. You testified that there was a switch panel or electrical panel on the wall of that building. Did you know if the electricity had been cut off, or was it still on at the time you were working there?

A. I could not say as to that.

(Testimony of V. J. McGrew.)

Q. Was the panel still there?

A. The panel was there, yes.

Q. Was there any electric globes in the building, in the [130] engine room?

A. I did not see any.

Q. Did you try to turn on the electricity?

A. No, I did not.

Q. How far was it from the point where you were last working with your torch to the point where you first observed smoke and flame?

A. It would be 15 to 18 feet.

Q. How far was it from where you were working with your torch to the cylinders?

A. About 15 or 20 feet.

Q. Was there anyone else in the engine room with you when you first saw the fire? A. No.

Mr. Lombardi: I think that is all.

Cross-Examination

By Mr. Gommo:

Q. Mr. McGrew, you have testified that prior to going into the engine room to perform this burning you observed the condition of the floor?

A. Yes.

Q. That was prior to any operation that was performed by you or anybody with you at the time, is that correct? A. That is right.

Q. Did you observe anything on the floor in the nature of a combustible material?

A. No.

Q. Then you say that you placed under the tank, prior to burning, some water? A. Yes.

(Testimony of V. J. McGrew.)

Q. How much water was that?

A. Two five-gallon buckets of water.

Q. That was placed where with relation to the area you were cutting?

A. Directly under the cutting. [131]

The Court: Q. Why did you put the water under the tank?

A. The concrete, your Honor, has a habit when it is oxidized of popping up; they tell me it is due to the water in the concrete when it hardens. I don't know that of my own knowledge. It is just what I heard, that concrete will break off and just pop up, make a little pot-hole.

By Mr. Gommo:

Q. Had you at any time observed that the concrete was popping up, as you say, during your cutting operation? A. Not there, no.

Q. You did not. You do a great deal of welding and cutting?

A. In connection with my own business I do considerable.

Q. You had experience in performing the cutting operation with material of various sorts at the distance of this tank from the floor?

A. I have cut considerable material that is laying even flat on the floor.

Q. Have you cut material which was lying directly on wood?

A. Yes, I have done that, too, where it was necessary.

(Testimony of V. J. McGrew.)

Q. What is the effect of the burning process on the wood?

A. To make a scar, just like putting a cigarette on the desk.

Q. Would it ever cause a fire? A. No.

Q. Now, then, after you returned from lunch, did I understand you were alone? A. Yes.

Q. At that time the condition of the tank, that is, the remaining part of the tank, was what?

A. What do you mean?

Q. What part of the tank was still intact?

A. The east [132] wall of the tank was there and the south wall was there.

Q. The north wall of the tank had been removed? A. Yes.

Q. Had all of the west wall been removed?

A. The west wall was removed at some earlier date. I suppose it was done when they removed the ammonia coil.

Q. You did not remove it?

A. I did not have anything to do with it.

Q. That had been removed before you ever went on the premises? A. That is right.

Q. Now, then, the east wall of the tank, was it exactly as the tank was originally constructed—the east wall of the tank, did that run the entire length?

A. No, I cut six feet off the north end of it.

Q. Six feet had been cut and that had been removed? A. That had been removed. [133]

Q. The operation that you started after returning from lunch was what?

(Testimony of V. J. McGrew.)

A. To cut across the floor of the tank.

Q. Before you started that you say you placed water on the floor? A. Yes.

Q. You did observe the condition of the engine room generally prior to your making the cut?

A. Yes.

Q. What that without your goggles?

A. Yes, that is right.

Q. Was there any fire or evidence of fire such as smoke that you observed at that time?

A. No.

Q. Now, then, you started to cut the floor of that tank, is that correct? A. That is right.

Q. At what point did you start to cut?

A. At the west side of it.

Q. And what distance from the north end?

A. 6 feet back.

Q. In other words, you started your cut across the floor of the tank at a point approximately where you had removed the east wall?

A. It was right at that point.

Q. You were going back to cut right across from the vertical cut that had been prevoiusly cut?

A. The tank had been welded there, that was the size of the original plate that was in there, and I was cutting it on the original weld, in order to save all of the plate that was possible.

Q. Now, then, you cut across the entire tank in one operation, did you? A. No, I did not.

Q. How did you make the cut?

(Testimony of V. J. McGrew.)

A. I cut from the west end approximately [134] to the center of the tank.

Q. From the west? A. From the west.

Q. To the center?

A. Yes, going east, and then in order to be in a safer position when the wing was cut off completely I stopped that cut there and started on the east side and came back to the middle again—that would be in the center of the plate when the plate was cut off.

Q. Which way were you then facing?

A. I was facing north; I was on the south section of the tank.

Q. Now, did you complete the cutting from the east to the other cutting in one operation?

A. Not in one operation, no.

Q. What was the reason for not doing it in one operation?

A. When I got approximately half of the distance the torch plugged and I had to clean it.

Q. You say it plugged up. Will you explain that to the Court?

A. It gets plugged up in the tip due to slag or scale or a deposit of some kind, it may be due to chemical reaction, I can't say, I don't know, but anyway the torch will plug the tip up so you haven't got heat enough for the oxygen to oxidize the metal.

Q. What did you do?

A. I shut the torch off and went back and commenced to clean the tip of the torch.

(Testimony of V. J. McGrew.)

Q. The tip of the torch is cleaned by special equipment that you have?

A. Yes, you have a drill which you can buy the right size to clean it with.

Q. You kept that where?

A. That is kept with the cylinders. [135]

Q. The cylinders are on the stand, is that correct?

A. Sometimes people use them that way, but in this case they were standing on the floor.

Q. You shut off your torch while you were on the tank? A. Yes.

Q. And then carried the torch to the cylinders?

A. That is right.

Q. Where were your goggles at that time?

A. Well, that is something that is purely automatic, whenever you shut the torch off, and even sometimes before you shut the torch off, the goggles are shoved up on your forehead without even thinking of it at all.

Q. Then you walked to the cylinders and cleaned the tip? A. Yes.

Q. Did you observe the condition of the engine room at that time?

A. I looked around the engine room, yes.

Q. Did you look completely around the engine room?

A. I did not go around the tank. All of the engine room I could see from the cylinders I seen.

Q. Did you see any evidence of fire at that time?

A. No.

(Testimony of V. J. McGrew.)

Q. Did you smell any evidence of fire at that time? A. No, I did not.

Q. Had there been any fire in the engine-room at that time would you have been in a position to have either seen it or smelled it?

A. I would say yes.

Q. How much of a cut did you have remaining after you cleaned [136] your torch?

A. Oh, possibly eighteen inches.

Q. Then you went back to the tank and completed that cut, is that correct?

A. Yes.

Q. What did you do after the completion of the 18-inch cut?

A. I took the torch off and took the hose and everything back to the tank.

Q. Where were your goggles?

A. On my forehead.

Q. On your forehead? A. Yes.

Q. At what time, in reference to the completion off this cut?

A. I would say right after the cut.

Q. Then you walked back to the cylinders?

A. Yes.

Q. At what time after the completion of the cut and your getting back to the cylinders did you notice the fire?

A. I believe it was a minute or a minute and a half.

Q. I beg your pardon?

(Testimony of V. J. McGrew.)

A. I believe it was a minute or a minute and a half.

Q. While you were making the cut what position did you take with relation to that cut?

A. I was kneeling directly on the floor; you see, the torch is about that long, and it has to be horizontal with the cut, so you will have both knees resting on the floor.

Q. Your hand in contact with the metal near your cut?

Q. It would be back—the whole torch is about that long; the lever that controls the oxygen is possibly back ten inches from the end of the tip; one hand is on the lever and the other is [137] between the tip and the lever.

Q. You first observed the fire after you returned to your cylinders, is that correct? A. Yes.

Q. I presume you were putting your torch away, it that correct?

A. I was rolling it up out of the way, rolling the hose up and setting my torch up out of the way.

Q. At what time in relation to that procedure had you first observed any fire in the engine room?

A. I observed fire afterward.

Q. After you completed coiling your hose on the cylinders, is that correct? A. Yes.

Q. Now, the fire was first observed by you where?

A. In the south portion of the room.

Q. Let me ask you this question: In the process of burning of the metal is there any material that

(Testimony of V. J. McGrew.)

is excluded from the original metal prior to that cutting, or removed?

A. Excluded or removed.

Q. Is any metal removed from the cut?

A. Well, you have the width of the cut itself, which is in this case, with a tip of that size, less than 1/16 of an inch wide; that metal goes some place.

Q. It does. A. Yes.

Q. What is that metal that is removed commonly referred to as?

A. We refer to it as slag.

Q. That is metal that is removed from the cut that you heat by [138] your torch, is that correct?

A. Yes.

Q. It is oxidized by the flow of oxygen and then removed from the original metal?

A. That is correct, yes.

Q. And that slag is the hot metal which causes ordinary concrete to pop? A. Yes.

Q. Does that metal hold its heat very long, in your experience?

A. No, not that amount—it depends on the size of the tips and the thickness of the metal.

Q. With this thickness of metal that you testified to, of 1/4-inch steel, and a tip of the size you were using, would slag from that type of cut retain its heat long? A. No, it would not.

Q. Now, then, after you saw the fire, you placed some water on the fire, and called the attention of

(Testimony of V. J. McGrew.)

the guard to the fire, and told him to call the fire department?

A. Yes, I told him to call the fire department.

Q. Then you went back, as I understand you, and removed the cylinders from the engine room?

A. Yes.

Q. Cylinders cause a certain amount of fire hazard?

A. They have been known to explode; they do not always, even though they burn up.

Q. There was no evidence of fire right at the cylinders? A. No.

Q. You then removed the cylinders from the engine room? A. Yes.

Q. Approximately what distance from the engine room had you removed the cylinders?

A. You mean as of what time—immediately?

Q. Well, immediately.

A. Well, I was pretty well worked out at the time and I dragged them about 25 feet or so away from the building.

Q. Then you eventually moved them further?

A. Yes, a gentleman came across and he took one of them and I took the other one and we carried them back and put them on the truck.

Q. I believe you testified that the door on the west wall of the engine room was left open, did you?

A. Yes.

Q. You also testified to a building other than shown on this diagram? A. Yes.

(Testimony of V. J. McGrew.)

Q. Will you take your pencil and draw on that diagram the building that you refer to?

A. Yes.

Q. For the purpose of the record, the building has been drawn near the door on the west wall of the engine room, to the north of the door. Approximately what is the size of that building?

A. Well, it was approximately 8 x 10, some such a matter.

Q. And in height?

A. The studding was 8 or 9 feet, and it had a roof over that; the total height, I suppose, might have been as much as 12 feet.

Q. Approximately how far was the building from the main door of the Ice Palace?

A. It was not more than 6 feet, it might have been 4 feet.

Q. I see you have drawn this at somewhat of an angle to the building; you are speaking now of the nearest point? A. Yes. [140]

Q. That would be a distance between 4 and 6 feet? A. 4 to 6 feet.

Q. So it would extend out here in this direction approximately 10 feet? A. Yes.

Q. After you had seen the fire on the south wall did you have an opportunity to observe the condition of the floor under the tank?

A. I did not get down on the floor and look under it, no.

Q. Did you see anything unusual with respect to the condition of the floor under the tank?

(Testimony of V. J. McGrew.)

A. No, I did not.

Q. Was there any fire there?

A. Not that I could see.

Q. Did you see any smoke coming out from under the tank? A. No.

Q. At any time?

A Not at that time no.

Q. Or at any time shortly before the fire?

A. No.

Q. Did you see smoke coming from under the tank?

A. That was after I came back from the cylinders.

Q. Prior to that time had you seen smoke coming from under the tank?

A. No great amount of smoke; you have a certain amount of smoke from any cutting operation.

Q. Was it enough smoke to give you any indication or evidence that there was any fire under there? A. No.

Q. There was no more smoke than had been caused by your burning operation?

A. That is correct.

Q. Your position during the cutting was, you say, on your knees with your hands in occasional contact with the metal, sometimes [141] direct contact, or at least close to the metal, is that correct?

A. That is correct.

Q. Did you feel any heat either through your knees or through your hands? A. No.

(Testimony of V. J. McGrew.)

Q. Was the metal any warmer than prior to any cutting operation that you performed?

A. No.

Q. At the place that you were in contact with?

A. No, it was not.

Q. You were in actual contact with the side of the cut completely across the cut? A. Yes.

Q. You were almost in a direct line, you were holding your torch at right angles to your body, is that correct?

A. It would be at right angles to the metal plate being cut, or at right angles to the cut that was being made.

Q. And as you made that cut you moved along with the torch? A. That is right.

Q. You are in contact with it during the entire cut? A. Yes.

Q. You felt no heat through either your knees or your hands? A. That is right.

Mr. Gommo: That is all.

By Mr. Wallace:

Q. Mr. McGrew, it is not quite clear to me where you first saw this smoke and fire. I think you testified that you had taken off in the first place—when you first got there, this whole west wall of the tank had already been removed, you had nothing to do with that? A. Yes, that is right. [142]

Q. You in the morning took off the north wall?

A. Yes.

Q. And in the morning you also took off this portion of the east wall? A. Yes.

(Testimony of V. J. McGrew.)

Q. Now, the tank, as I understand it, was off the floor six or eight inches. A. Yes.

Q. Now, this tank, itself, stood up how high—it was about six or seven feet high?

A. I would say seven feet.

Q. Seven feet? A. Yes.

Q. So that except for this area north of the tank that was not blocked by the tank you could see the wall on this side, couldn't you? A. Yes.

Q. This south wall of the tank was still up, is that right? A. Yes.

Q. So that if you were in that position you could not see the south wall of the building?

A. Well, the building was about 12 feet above—you could see maybe a few feet.

Q. I think you testified after you came back from lunch you started on the west side of the tank floor. A. Yes.

Q. You cut a matter of half way across the tank?

A. Yes.

Q. Then you moved from the end of that cut over to the east edge of the tank? A. Yes.

Q. You commenced to cut the tank?

A. Yes.

Q. And then you plugged up your torch, or it plugged up? A. It plugged up.

Q. Then you got up and went back to your cylinders, which is a [143] distance of what?

A. Fifteen or twenty feet.

Q. And cleaned the torch? A. Yes.

Q. How long did that take?

(Testimony of V. J. McGrew.)

A. Three or four minutes, possibly five minutes.

Q. Then you went back with your torch to where you had ended cutting? A. Yes.

Q. You then cut the 18 inches in this cut you previously made? A. Yes.

Q. Now, I understand the torches connected with two hoses? A. Two hoses.

Q. To two separate tanks?

A. That is right.

Q. You were back at the tanks—you had rolled up your hose and were back at the tanks when you first saw the fire? A. Yes.

Q. Or flame, or smoke? A. Yes.

Q. Now, you said that you saw it in the southeast corner of the engine room.

A. The portion that I seen was over the top of the tank.

Q. You saw it over the top of the tank?

A. Yes.

Q. This morning I think you testified that there were no windows on the east side.

A. No, there were no windows.

Q. There was a door? A. A door.

Q. A single or double door?

A. A single door.

Q. That door was closed? A. Yes.

Q. There were windows down here on the south side?

A. Two small windows pretty high up. [144]

Q. Where, with relation to these windows did you see it?

(Testimony of V. J. McGrew.)

A. You mean where I seen the fire?

Q. Or smoke. Would you indicate on the diagram where you saw it?

A. Well, the smoke was across this whole portion. I could not see any part outside of possibly a little corner in here of this back wall.

Q. Now, you were standing inside the doorway.

A. I was standing right here.

Q. Inside of the door way of the engine room, so-called? A. Yes.

Q. About how far from the door?

A. About six or seven feet, something like that.

Q. Six or seven feet from the northwest corner of the engine room building inside?

A. Yes.

Q. You were then looking in a general southwesterly direction, looking over in that direction?

A. Yes, that would be the range of vision.

Q. You say you saw the smoke over the top of the tank?

A. Well, over the top of the tank and alongside of it.

Q. And alongside of it to the south?

A. Yes.

Q. Now, was the smoke and fire inside of the building or outside of the building?

A. It was inside of the building.

Q. Did you get any idea of the source of the fire from the smoke or the flame?

A. I did not.

(Testimony of V. J. McGrew.)

Q. All you saw was it was above the top of the tank, is that what I understand?

A. Yes. [145]

Q. You have not any idea of its source?

A. No.

Q. When you left the building, left this engine room, you say you went around to the watchman. Did you go around the west side or the east side of the building?

A. I went around the west side.

Q. The west side of the building?

A. Yes.

Q. You went up to what part of the building?

A. That would be the northeast corner.

Q. The northeast corner? A. Yes.

Q. In front of the building, or on the side of the building? A. On the side.

Q. How far from the northeast corner?

A. That was a matter of a very few feet, it might have been ten or twelve, something like that—it might have been 20 feet, I don't know.

Q. As you went along that west side, did you see any evidence of smoke or fire on the inside of the main building, where the tires were stored?

A. No, I did not.

Q. Did you see any evidence of fire along this west wall of the main building?

A. No, I did not.

Q. Or north side of the building?

A. No, I did not.

(Testimony of V. J. McGrew.)

Q. Let me ask you this: How did you come back, the same way?

A. I came back the same way that I went.

Q. So you did not go all around the building?

A. I did not.

Q. Did you look as to the condition of the east side of the building?

A. I suppose I might have looked down that wall, I [146] have no conscious memory of it.

Q. You have no recollection of whether you saw any fire or smoke there? A. No.

Q. Did you at any time look in this area, the south wall of the main building?

A. I was at no time in a condition where I could see that.

Q. Did you ever at any time look in this area that was immediately east of the engine room?

A. You say "any time." When do you mean?

Q. During the time that you were cutting there that morning.

A. The first day that we were there we went through that door.

Q. By "that door" you mean this door that leads out on the east side? A. Yes.

Q. You were through there that day?

A. I was through there that day.

Q. Did you at any time after you noticed the fire have any view of any of this area in here?

A. No, I did not.

Q. East of the engine room?

A. No.

(Testimony of V. J. McGrew.)

Q. Now, I understand you left in the morning at about what time—you quit work?

A. I went out about possibly ten minutes to twelve.

Q. And you were back by twenty minutes after twelve?

A. Some such matter.

Q. You had had a helper in the morning?

A. Yes.

Q. But you did not have one when you came back at twenty minutes [147] after twelve?

A. No, he took an hour for lunch and was not due back until 1:00 o'clock.

Q. When you came back at twenty minutes past twelve your two cylinders were standing inside of the door? A. Yes.

Q. And you then picked up your torch and commenced your cutting? A. Yes.

Q. And at no time up to the time when you testified that you first saw smoke and some flame over the top of the remaining portion of the tank—at no time did you feel any heat or see any smoke or smell any smoke, or see any evidence of fire?

A. No, I did not.

Q. Now, during the course of your cutting operations, when you cut off the north wall of the tank was there any evidence of fire, or did you see any evidence of fire in any of that?

A. No.

Q. Or any unusual heat? A. No.

Q. When you came back after lunch and made

(Testimony of V. J. McGrew.)

your first cut from the west side of the bottom of the tank, was there any unusual heat when you were kneeling on that tank? A. No.

Q. So far as you know, at no time while you were in the bottom of the tank on your hands and knees did you feel the bottom of the tank unusually warm? A. No.

Mr. Wallace: That is all.

Mr. Getz: Q. Mr. McGrew——.

The Court: I hope counsel is not going to go over this unless there is something special. [148]

Mr. Getz: I have only some special matters, if your Honor please.

Q. When was the first time that you went to the Ice Palace in connection with the removal of any equipment or steel pipe?

A. The first time I went there, I believe, was either the 6th or 7th.

Q. Either the 6th or the 7th? A. Yes.

Q. You went with Mr. Sanchez. You said Mr. Sanchez was there, didn't you?? A. Yes.

Q. Now, then, on that day did you go into the main building? A. No.

Q. Did you ask permission to go in the main building?

A. I at no time asked permission personally to go into that building.

Q. Did you at any time get permission from anybody to go into that building, or the engine room? A. You mean personally?

Q. Yes. A. No.

(Testimony of V. J. McGrew.)

Q. You do know that when you went down the 7th the guard told you you could not go in without further authority?

A. I believe he told Mr. Sanchez; he did not tell me. Mr. Sanchez told me.

Q. You understood that Mr. Sanchez had permission, but you don't know that of your own knowledge, do you?

A. I did not personally go with him, no.

Q. You don't know from whom, if at all, he obtained any such [149] permission, do you?

A. That is right.

Q. Do you know whether or not Mr. Sanchez had been there at the building and removed some pipe a short time before that?

A. No, I don't know that, either.

Q. When you entered the engine room you entered it from the outside of the main building, didn't you? A. Yes.

Q. And you did not at any time contact or have anything to do with anyone there employed by the Capitol Chevrolet Company?

A. No, I didn't have anything to do with them.

Q. At no time in all of your dealings at the Ice Palace did you have any contact of any kind with anyone from the Capitol Chevrolet Company: Is that right?

A. No, I didn't personally know any of them.

Q. And this enterprise that you were engaged in had no connection whatever with the Capitol Chevrolet Company, did it?

(Testimony of V. J. McGrew.)

A. Not to my knowledge.

Q. You were never employed or retained or contacted with by the Capitol Chevrolet Company?

A. No.

Q. You were not engaged in anything for their benefit? A. Not to my knowledge.

Q. Now, was there a fence on the south portion of that building?

A. There was a board fence running from the engine room to the southeast corner of the main building, forming a rectangle there.

The Court: Is that unimproved vacant land in the rectangle? [150]

A. It was a bare lot.

Mr. Getz: Q. What type of fence was that?

A. It was a board fence about six feet high.

Q. You say you looked into that area from this door in the southeast corner—you looked into the area that was enclosed by this high board fence, is that right? A. Yes.

Q. That was not on this occasion when you were burning the metal, was it?

A. No, it was not on that occasion.

Q. It was on some previous occasion?

A. No, it was the day before.

Q. When you left the day before the fire you closed the door and locked the door?

A. Yes, it was locked that night when we left.

Q. And it remained locked thereafter?

A. Yes. It was not unlocked until the next morning.

(Testimony of V. J. McGrew.)

Q. When you returned from lunch were there any of the men from the Capitol Chevrolet Company in or about the building, that you recall?

The Court: Are you speaking of the engine room, now?

Mr. Getz: No, the building, itself.

A. There was nobody that I seen, no.

Q. At no time did you ever see anybody from the Capitol Chevrolet Company in or around this engine room: Is that right?

A. No, I do not believe there was ever anybody from the Capitol Chevrolet in the engine room. [152]

Q. When you went to the office the only man that you found was this guard who used the telephone, is that right?

A. That is right.

Q. Whose equipment was this that you were using? A. My own.

Q. Your own? A. Yes.

Mr. Getz: I think that is all.

The Court: We will take the noon recess at this time until two o'clock.

(A recess was here taken until two o'clock a.m.) [152-a]

Afternoon Session, February 14, 1945, 2:00 p.m.

V. J. McGREW,

recalled;

Cross-Examination (resumed)

The Court: Is there anything else with this witness?

Mr. Getz: I finished before lunch.

Mr. Hughes: I would like to ask Mr. McGrew just one or two questions.

Q. Mr. McGrew, do you know Mr. Parella?

A. Not outside that I heard his name prior to this trial.

Q. Prior to this trial you did not know him?

A. I had heard his name, that was all.

Q. You did not meet him personally?

A. No, I did not.

Q. Did he consult you or you consult him at any time prior to the time you went into the Ice Palace with Mr. McGrew? A. No.

Q. You had never been employed by him for well work, or anything like that?

A. No, I never had.

Q. While you were there I don't suppose you saw him around the building? A. No.

Q. You did not get any permission from him?

A. No.

Q. In regard to the West Sacramento Water Company, that you have mentioned here, you understand that that is Mr. Henry, himself?

A. Yes.

Q. That is the name he does business under?

A. That is my understanding, yes. [153]

(Testimony of V. J. McGrew.)

Q. Your dealings with the West Sacramento Water Company were always with Mr. Henry, were they? A That is right.

Mr. Hughes: That is all.

Mr. Glicksberg: Q. Mr. McGrew, of course you know Clyde Henry and you have known him for several years? A. Yes.

Q. How many wells had you dug for him prior to the year 1943?

A. Thirteen or fourteen or fifteen.

Q. What was your arrangement in the digging of those wells?

A. They were dug at so much a foot.

Q. How were your operations handled when you were to dig at so much a foot?

A. Well, I was to be paid a certain sum for every foot that the well went down.

Q. In other words, you contracted with Mr. Henry, or Mr. Henry contracted with you, to put in a well at a certain place, and then you proceeded to do that work? A. Yes.

Q. Did Mr. Henry have any control over any of your operation in your well-digging operations?

A. No. I did it.

Q. Did he have anything to do with those well-digging operations other than to give you an order to dig a well? A. No.

Q. With reference to this particular incident in 1943, was there any change in your arrangement in relation to this one well?

(Testimony of V. J. McGrew.)

A. Yes, the arrangement was changed from a footage basis to an hourly basis.

Q. What do you mean by that?

A. Well, I was to be paid by the hour, the amount of hours it took to do this particular [154] work.

Q. But there was no other change in the contract about the digging of the well? A. No.

Q. On this particular well did Mr. Henry have any control over any of your operation?

A. No.

Q. With reference to this particular well, when did you find that you were short on pipes?

A. We knew there was a shortage of pipes before we started this well.

Q. When was that?

A. Well, it was about three weeks before April 9.

Q. In other words, in the early part of March?

A. Yes, whenever the well was started.

Q. Let me go back: This particular arrangement about the digging of the well and your contact with Mr. Henry was made during the month of February, would you say, February or March of 1943?

A. Oh, we could have contracted for what in January, even, the work was that far behind.

Q. When did you first have any conversation with Mr. Henry with respect to this plate steel, if you recall?

A. It was the last time I spoke to him, I don't

(Testimony of V. J. McGrew.)

remember the time, I think it was four or five days before that.

Q. Before the fire? A. Yes.

Q. Where did you see him?

A. At the well.

Q. Where was that well?

A. Out in West Sacramento, I don't know the name of the street. [155]

Q. That is quite removed, some distance removed from this Ice Palace?

A. As much as possibly two or three miles.

Q. What conversation did you have with Mr. Henry at that time?

A. Well, he asked me what we required and what we needed after finishing of the digging of the well in the way of fittings for the casing, which we could not find; we were discusing the possibility of where iron might be available from. That was the conversation we had.

Q. In regard to that, what did Mr. Henry say and what did you say?

A. Well, he mentioned the fact that he owned this material, and whether or not this metal in the brine tank would be suitable, and whether there was enough of it.

Q. What did you say?

A. Well, I thought possibly it would be enough.

Q. Had you seen the brine tank prior to that time?

A. No, I do not believe I had seen it; he gave me the dimensions of it and the size of the metal.

(Testimony of V. J. McGrew.)

Q. After you told him that it was possibly enough did you have any further conversation along those lines as to what you were going to do if you had that steel?

A. Yes, I would have it made.

Q. What did you tell him, if you did have any conversation?

A. If the steel was available from any source we could finish the well and have it finished up.

Q. After you had the steel available from this brine tank or [156] from any other source what would they have to do with that steel?

A. It would have to be sent to the Sacramento Pipe Works to have it perforated and rolled.

Q. And then you would take possession of it and start using it at the well site?

A. That is right.

Q. Mr. Henry told you that he had that steel available, and what did he tell you about the means of getting it, if anything at all?

A. I don't believe he said anything about that, except that it was there.

Q. Did he tell you you could go and get it?

A. My understanding of the conversation was that it was there and I could have it if I could use it.

Q. He did not tell you at that time you should go at a certain date and set a time to take it?

A. No.

Q. Did you talk to Mr. Henry at any time after that prior to the fire?

(Testimony of V. J. McGrew.)

A. I don't believe I seen him after that.

Q. As a matter of fact, he was not in Sacramento, was he?

A. I would not know as to that.

Q. When did you decide to go and see if you could secure this plate?

A. I believe that was, it must have been the 8th, the morning of the 8th.

Q. What did you do?

A. I contacted Mr. Sanchez and told him that he would have to go over there and get it.

Q. Tell us, first of all, where you contacted Mr. Sanchez.

A. I contacted Mr. Sanchez at his place, which is within a block [157] of where the well was being put in; I seen Mr. Sanchez practically every morning.

Q. This conversation that you had with Mr. Sanchez you placed on the morning of the 8th; around the morning of the 8th?

A. It might have been in the afternoon of the 7th.

Q. Was there anyone present at that conversation?

A. The chances are Mr. Elmore was somewhere around there, but whether he was actually present so he could hear what we were saying or talking about, I don't know.

Q. What did you say to Mr. Sanchez, and what did he say to you?

A. Well, I believe I explained what we needed

(Testimony of V. J. McGrew.)

the iron pipe for, and the fact that Mr. Henry had stated that I could use it.

Q. You testified on direct examination this morning that Mr. Sanchez told you, "Let us go and get the pipe." Was there any such conversation?

A. Well, we had to start from some place.

Q. Was there any such conversation at all, "Let's go and get the pipe"?

A. As far as the actual words are concerned, I would not say.

Q. As a matter of fact, Mr. Sanchez didn't say anything until you told him, "Now, here, I want to get that steel out, and can you get me permission to go in there"?

A. He did not bring it up, no.

Q. You were the one?

A. I was the one that needed the metal, yes.

Q. I am referring to the conversation, it does not have to be in [158] the exact words, but in substance, when you first saw Mr. Sanchez you told him that you were ready to go over to the ice rink and take that steel out and move it into the job, and asked him to secure permission for you to enter upon the premises?

A. That is correct.

Q. Mr. Sanchez did not say, "We will go," or "You will go and take the steel out," did he?

A. No, I don't suppose he did.

Q. When next did you see Mr. Sanchez?

A. I met Mr. Sanchez at the corner of the Ice Palace.

(Testimony of V. J. McGrew.)

Q. The next morning?

A. That would be the same morning if it was not on the 7th when I decided to go over there—I don't know whether it was the afternoon of the 7th or the morning of the 8th.

Q. Was that the morning that you commenced work?

A. We did not start that morning, we started very late in the forenoon, if I am right in my time.

Q. But you met Mr. Sanchez that morning?

A. That morning at the Ice Palace.

Q. Where did you meet Mr. Sanchez?

A. That would be at the northwest corner.

Q. The northwest corner of the Ice Rink?

A. Yes.

Q. Did you have your truck there?

A. I had my truck there.

Q. With your acetylene equipment loaded upon the truck? A. That is correct.

Q. Was the engine room open?

A. No, I think it was not. [159]

Q. You don't think it was open?

A. It might have been at that time, I do not quite think that it was.

Q. How close was this meeting place with reference to the front of the building, or the main entrance?

A. We were probably directly opposite the front—as to the main entrance of it, or the center of

(Testimony of V. J. McGrew.)

the building, it would be about half the distance of the building.

Mr. Wallace: I understand you are talking about the main building, not the engine room?

Mr. Glicksberg: Yes.

Q. Did you have any conversation with Mr. Sanchez at that time, or did Mr. Sanchez just proceed to do something?

A. He told me, I believe, he had to get additional authorization or something before we could go to work there.

Q. Then what did you do, did you wait there?

A. No, I left and came back.

Q. Didn't he proceed to see someone?

A. He must have.

Q. You did not see him?

A. I did not see him, no.

Q. You don't know where he went or who he saw? A. No, I have no idea.

Q. When he came back, where did you meet him? I will withdraw that quqestion. When did you come back?

A. I believe I came back right after dinner.

Q. Where did you meet Mr. Sanchez then?

A. I either met Mr. Sanchez at the well or at the icehouse, I would not be positive. [160]

Q. You don't recall?

A. I don't recall.

Q. But you say that he drove over to the Ice Palace? A. He drove over, yes.

Q. You followed him?

(Testimony of V. J. McGrew.)

A. I followed him with the truck.

Q. At that time was the door open, this door to the engine room?

A. Well, when I got there, Mr. Sanchez was talking to the guard, and I believe the guard came around to the engine room at that time with him.

Q. When you reached the Ice Palace then you and Mr. Sanchez proceeded to go and see the guard?

A. No, Mr. Sanchez had already seen the guard before I got there.

Q. He had already seen the guard before you got there? A. Yes.

Q. And you then came there and by that time Mr. Sanchez was waiting for you?

A. They were apparently waiting for me to show up.

Q. When the guard came back with Mr. Sanchez was there any conversation between you three?

A. As I recall there was nothing said, I don't recall anything.

Q. Was there anyone told you you could enter the building now?

A. Mr. Sanchez said "O.K.," or something like that.

Q. In the presence of the guard?

A. He was there.

Q. Who opened the door, do you recall?

A. I believe the door was fastened from the inside and Mr. Elmore went through one of the windows, if my recollection serves me right.

(Testimony of V. J. McGrew.)

Q. Coming back to this Mr. Elmore, what did Mr. Elmore do on [161] this particular job?

A. You mean at the Ice Palace?

Q. Yes.

A. He was to give me a hand with the pieces that were too heavy to handle.

Q. Did he have anything to do with the acetylene equipment? A. No.

Q. Did he know anything at all about acetylene torch work?

A. I am not able to say; as far as I know he did not.

Q. All he did was just give you a hand in lifting the heavy pieces of steel when they had to be moved? A. That is right.

Q. There was nothing else that he did?

A. No.

Q. He certainly did not direct you how to do the cuting, or when to do the cutting?

A. No.

Q. Or when to use the acetylene torch?

A. No.

Q. And Mr. Sanchez gave you no directions?

A. No.

Q. About using the acetylene torch or whether you should use it or should not use it?

A. No.

Q. You had Mr. Elmore with you—was that at your request?

A. It was part of my contract that I was to be furnished help.

(Testimony of V. J. McGrew.)

Q. What was that contract?

A. Well, I was being paid so much an hour for my time and my equipment, with the help thrown in; that is, that was in addition.

Q. In other words, your contract had nothing to do with the manual labor of moving the steel, or anything else that had to be done?

A. Well, when it comes to the amount of manual labor involved in a well, it is more than one man can handle, and not [162] having any men of my own I stipulated that I should have help.

Q. Now, this man Mr. Elmore, was he under your control, under your supervision when he was with you at this Ice Palace?

A. He was doing what I told him to do.

Q. You were the one that gave him the orders?

A. Yes, I told him what to do.

Q. Did Mr. Sanchez, when he gave him to you, say that he was to follow your orders?

A. That must have been his understanding, yes.

Q. Did you hear that?

A. I am not sure about that. He might have told him before I got there.

Q. Mr. Elmore, I think you testified, was not present at the time, about 12:30, when you returned to the job?

A. He left about ten minutes to twelve.

Q. When next did you see him, if you saw him at all?

A. I do not believe I saw him for two or three days.

(Testimony of V. J. McGrew.)

Q. Were you paid on this particular job by Mr. Henry?

A. Yes, I was paid on the total number of hours that I worked.

Q. You submitted a bill in accordance with the terms of your contract? A. Yes.

Q. You were paid? A. Yes.

Q. You never took the pipe or steel out??

A. No.

Q. That was there?

A. To the best of my knowledge it was there.

The Court: Under this contract with Mr. Henry you were to do the drilling of the well and he furnished the material, whatever [163] was necessary?

A. That was the understanding.

Q. Did you furnish anything else, except your services?

A. In this particular instance, I did not.

Q. You were paid so much per hour for your labor?

A. For my labor and the equipment I personally owned.

Mr. Glicksberg: Q. Will you tell his Honor the reason why on this particular job you did not furnish any of the materials?

A. Well, I believe the War Production Board ruled that we had to have a priority in order to buy any new material, and I could not buy new material for the job, not having the right priority for it, so the material had to be bought with the

(Testimony of V. J. McGrew.)

priority or picked up second hand, where the priority was not necessary.

Q. Did you pick up any material for this job?

A. I believe we picked up some pipe; I never paid for any of it.

Q. Did you charge it to yourself or do you know whether you charged it to Mr. Henry?

A. It was charged directly to Mr. Henry.

Q. Where did you pick it up?

A. I picked it up in Oakland, myself.

Q. It was your job to secure the pipe where it was available?

A. Yes, that was the understanding.

Mr. Glicksberg: No further questions.

Mr. Wallace: I think I asked the witness this question, but I want to make sure:

Q. You had no connection of any kind with the Lawrence Warehouse Company?

A. No. [164]

The Court: Is that all with this witness?

Mr. Miller: That is all.

GUS LEO JOHNSON,

called as a witness for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please?

A. Gus Leo Johnson.

Direct Examination

Mr. Miller: Q. By whom are you employed?

(Testimony of Gus Leo Johnson.)

A. By the Goldfield Consolidated Mines Company, as their plant superintendent.

Q. Where is that plant?

A. At 266 Napoleon Street, about three blocks away from Potrero and Army.

Q. Are you interested in this particular litigation in any way? A. In which?

Q. In this litigation, in this lawsuit, in any way?

A. Yes.

Q. What is your interest? Let me ask you this question——

Mr. Wallace: Let the witness answer.

Mr. Miller: Go ahead and answer.

A. I am interested in the testimony of another man.

The Court: You are not interested in the litigation?

A. In no shape or form.

Mr. Miller: Q. Are you employed by any party to this action? A. No.

Q. Do you know any of the parties to the action?

A. No, I do not.

Q. So that when you said you were interested, you mean you were [165] interested in the testimony, is that correct? A. That is right.

Q. How long have you been employed by the Goldfield Consolidated Mines Corporation?

A. Three years ago, last January 15th, when I started.

Q. Have you been plant superintendent during that entire period? A. Yes.

(Testimony of Gus Leo Johnson.)

Q. What is the nature of the operations of that plant?

A. Manufacture and rebuilding of various kinds of equipment.

Q. At that plant do you have occasion to use or to supervise the use of acetylene torches for cutting?

A. Yes, daily.

Q. Daily? A. Yes.

Q. Before you took that employment for whom did you work?

A. For the Indian Valley Mining Company, located at Greenville, California, as general manager of their mine.

Q. How long were you there?

A. Eight years.

Q. In that work did you have occasion to use or to supervise the use of acetylene torches for burning purposes? A. Yes.

Mr. Getz: I object to the question as a double question, occasion to use, and supervise the using.

Mr. Miller: Q. Did you have occasion to use acetylene torches? A. Yes.

Q. Did you have occasion to supervise the use of acetylene torches by others? A. Yes.

Q. For how many years have you had experience in the use of acetylene torches for burning?

A. Off and on, since 1917 I learned to [166] operate an acetylene torch.

Q. Do you know what is meant by a size Zero burning tip? A. Yes, I do.

Q. Do you know what the heat of the flame

(Testimony of Gus Leo Johnson.)

would be at the point of burning if you were using an acetylene torch with a size Zero tip?

A. Yes.

Q. What would be the temperature?

A. About 2600 Fahrenheit.

Q. If an acetylene torch with a size Zero tip was being used to cut a quarter-inch steel plate resting on blocks 8 inches above a concrete floor, with the cutting flame directly downward toward the plate, in your opinion would the heat from the torch or the burning metal, set fire to or ignite wood, grease, metal, tar, rags, or any other inflammable material that might be lying on the floor?

A. Yes.

Mr. Gommo: I object to that.

The Court: I do not think I need any expert testimony on that. I think I would know that myself, wouldn't I? I think it is quite apparent that a torch having a temperature of 2600 degrees would set fire to the rags and inflammable material. I don't think I need an expert to tell me that.

Mr. Getz: Assuming it was directly in contact with it.

The Court: I do not think it is necessary to tell me that a flame at such a heat would set fire to material that is inflamable if it is brought in contact with it.

Mr. Gommo: I object to the question on the ground the witness [167] is not qualified and as assuming a fact not in evidence. All of these things are not in evidence.

(Testimony of Gus Leo Johnson.)

The Court: He wants to know if the flames 8 inches away from the various material would set fire to it.

A. Anything inflamiable within 8 inches of where you are cutting, in my opinion, would catch on fire very suddenly, and I have seen it many times.

The Court: You refer to a distance of 8 inches. I don't know what you had in mind.

Mr. Miller: I say if it was placed on planks 8 inches above the floor, because Mr. McGrew has testified that this tank was 8 inches above the floor.

The Court: Q. The question you are being asked is this, with articles such as mentioned 8 inches away from the flame of the acetylene torch, the flame having this temperature, would they be set afire with the flames? Can you answer that?

A. The slag and burned metal would.

Mr. Miller: That is all.

Cross Examination

Mr. Gommo: Q. Mr. Johnson, what is the heat necessary to cause combustion of wood?

A. That I couldn't answer.

Q. What is the heat necessary to cause combustion of metal?

A. The flame from the slag will catch metal on fire.

Q. The metal on the floor?

A. Yes, if you drop slag on the floor it will catch on fire. [168]

Q. Do you know the heat in that direct application of the flame from the slag?

(Testimony of Gus Leo Johnson.)

A. Well, it don't necessarily have to be directly to the laying on the floor.

Q. The amount of heat that is generated by the slag as it comes in contact with the metal that causes it to start fire, what will that be?

A. The amount of heat, I could not say, what that would be.

Q. Do you know the amount of heat that is in the slag that would fall from the cutting of the metal? A. Yes.

Q. In a cutting operation?

A. Yes. Steel, for example, will burn at about 2200 degrees, and slag that drops, molten hot slag dropping will retain its heat two feet away from where you are cutting.

Q. Will retain a heat of 2200 degrees Fahrenheit?

A. I would say, as near as we can see, it is still burning and sparking.

Mr. Gommo: Might I say, your Honor, for the purpose of the record, I am cross examining this witness without waiving my objection to his qualifications.

The Court: You can attack his qualifications as to handling acetylene torches.

Mr. Gommo: Q. How long will the slag retain its heat?

A. It gradually cools off, just exactly I would not say, two minutes, or three minutes.

Q. Do you know how long after slag would have fallen eight inches that it would retain sufficient heat to cause combustion? [169]

(Testimony of Gus Leo Johnson.)

A. Well, I don't pick it up with my fingers. It would be too hot to do so.

The Court: He wants to know how long would this slag retain its heat after it had fallen.

A. Merely a guess, two minutes.

Mr. Gómmo: Q. As a combustible heat?

A. Yes, after it left the torch.

Q. After it had left the metal? A. Yes.

Q. Now, then, you say a zero tip would cause what temperature, create what temperature?

A. How is that?

Q. A zero tip would create what temperature?

A. At the tip of the torch about 2600.

Q. That is right at the end of the flame?

A. That is where it hits the metal.

Q. You answered the question if it was a zero tip that it would create 2600 degrees Fahrenheit of heat, is that correct? A. Yes.

Q. Now, then, isn't it a fact that the heat caused by a torch is dependent upon the amount of oxygen as compared to the amount of acetylene, that is being fed to that torch? A. That is correct.

Q. So that if you have a smaller amount of oxygen and a smaller amount of acetylene it is possible to have a flame at the end of the torch that is not 2600 degrees Fahrenheit?

A. You have to have it over 2200 in order to cut through steel.

Q. You were asked the question, what was the temperature at the tip of the torch and you said 2600 degrees Fahrenheit. A. Yes. [170]

(Testimony of Gus Leo Johnson.)

Q. But you did not have sufficient facts to say that there was 2600 degrees Fahrenheit of all torch tips?

A. It has got to be over 2200 degrees to cut steel, and an experienced man on a torch regulates his torch to around 2600 degrees, regardless of what sized tip he might use.

Q. Do you know the thickness of the metal here?

A. I understood it was a quarter of an inch, yes.

Q. You were told that before your appearance in the court here? A. Yes.

Q. Isn't it also true that where it is heavier metal there would be a greater degree of heat?

A. They use larger tips to cut heavier metal, but do not need to have any higher heat; there is a larger flame, however.

Q. Now, then, as to the condition of the slag being formed on and in an area under a cut, isn't it true that the amount of oxygen or the amount of pressure put into a blower of the torch determines to a large extent the condition of that slag?

A. I don't quite get your question.

Q. In the ordinary burning operation of the line pressure of oxygen, do you have about twice that of acetylene?

A. 15 acetylene, 30 oxygen.

Q. Now, then, 30 pounds of oxygen is not being fed into the torch at all times, is that correct?

A. That depends on the tip.

Q. Assuming now that you are using the zero type as in this case.

(Testimony of Gus Leo Johnson.)

A. You use most of the 30 pounds, I would say, to cut through quarter-inch steel. [171]

Q. You will use all 30 pounds to cut steel, is that correct?

The Court: This is a very interesting subject, but I think you are unnecessarily taking up the court's time. The facts in the case show that there was a torch used, and it had a flame sufficient to cut through this steel. What difference does it make what kind of an outfit there was? As I say, it may be interesting, but what possible connection has it with the issues in this case?

Mr. Gommo: I can explain it in this way: I think the witness here has drawn a conclusion without sufficient facts upon which to base this conclusion.

The Court: I do not see any relevancy at all of the testimony of the witness on direct or cross examination. What possible relevancy is there as to the amount of heat generated or what kind of a torch was used? What has that to do with this case?

Mr. Gommo: They put the witness on.

The Court: I do not see the relevancy of the testimony. I do not want to cut you off if you have some point in mind, but I do not see what this has to do with this case.

Mr. Gommo: In view of the statement by the Court, we now move that the testimony of this witness be stricken from the record.

The Court: I will not strike the testimony, but

(Testimony of Gus Leo Johnson.)

I will state for the record, so that both sides may know it, I think [172] that the court has enough knowledge to know that a flame that has heat from a torch that can cut through metal can ignite combustible material. I do not require an expert to tell me that.

Mr. Gommo: That is all.

Mr. Miller: I assume there is no objection to this witness being excused?

Mr. Getz: None, whatever.

Mr. Miller: I will call Mr. Kissell.

W. R. KISSELL,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Q. Will you please state your name to the Court?

A. W. R. Kissell.

Direct Examination

Mr. Miller: Q. Mr. Kissell, were you employed as watchman at the Ice Palace in West Sacramento on April 9, 1943? A. I was.

Q. Were you there at the time of the fire that destroyed the Ice Palace? A. I was.

Q. By whom were you employed?

A. By the Burns Detective Agency.

Q. Who issued your instructions as to your duties as watchman there?

(Testimony of W. R. Kissell.)

A. Mr. Burns and Mr. Harris, of the Burns Detective Agency.

Q. Do you recall on April 9, 1943, seeing some workmen working in the engine room at the Ice Palace? A. Yes.

Q. Did you permit them to go in there?

A. They had a permit, [173] I did not do the permitting; that is, there was an order left there for them to go to work. I did not stop them. I allowed them to go to work that morning.

Q. What time did you go on duty?

A. At eight o'clock.

Q. Were they working when you came on duty?

A. Yes, they were.

Q. You say there was an order. What do you mean by that?

A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.

Q. Did that appear in your book of instructions, or whatever you kept there?

A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company.

Q. While you were on duty that day and before 12:30 did you have occasion to go back to the engine room and observe this work?

A. I went back, around 11:30, I would say.

Q. What was happening when you went in there at 11:30?

(Testimony of W. R. Kissell.)

A. Well, one man was just standing there, and another man was using an acetylene torch.

Q. What was he doing with the acetylene torch?

A. He was cutting a piece of steel or sheet metal.

Q. Did you have occasion to look around the engine room at that and observe the condition of the floor and the rest of the room?

A. I was not inside of the building, I was just to the door.

Q. Did you look in the door?

A. Just in the door, yes. [174]

Q. What did you see on the floor?

A. Well, I did not see much of anything on the floor, with the exception of one thing, on the northeast corner of this tank he was cutting on.

Q. What did you see there?

A. It looked to me just like, well, there was some dark material just under the edge of the tank.

Q. Did you say anything to the man at that time?

A. Well, I said something to the man who was standing there, I asked him to be sure and be cautious about fire, watch for fire, and he said they were.

Q. This, you say, was about 11:30?

A. Somewhere around there.

Q. What did you do then?

A. I went back. I went back into the front part of the building.

Q. When did you first learn that a fire had started?

(Testimony of W. R. Kissell.)

A. Well, approximately, I would say, just about 12:30.

Q. How did you learn of the starting of the fire?

A. A fellow came to the east door, on the northeast corner of the building, and rapped on the door, and told me there was a fire in the back part of the building.

Q. Do you know who that man was?

A. I did not at the time, no.

Q. Was it Mr. McGrew who testified here today, or do you know?

A. It was, I found out afterward.

Q. What did you do then?

A. Well, I called the main Sacramento Fire Department and they would not come across the river on account of being out of the city limits, and I called the West Sacramento Fire Department, and they came over and responded to [175] the fire.

Q. How long did it take you to complete those two calls, do you recall?

A. Well, I would say possibly ten minutes.

Q. And by that time did you observe the progress of the fire?

A. No. The fire had not started in our building yet. I put in a call for Capitol Chevrolet. There was no fire then in the building. [175-a]

Q. When did you first actually see the fire yourself?

A. The first actual fire I saw, I was about halfway through talking to the party at the Capitol

(Testimony of W. R. Kissell.)

Chevrolet when I noticed the fire and smoke in the south end of the building.

Q. When you say the south end of the building, you mean the south end of the main building? If this was the wall of the engine room, where would it be with relation to this wall?

A. Is that the east end of the engine room?

Q. This is the northeast corner of the engine room.

A. Well, I would say somewhere between 8 and 10 feet east of there.

Q. Along about in here? A. Yes.

Q. Did you see Mr. McGrew at any time after he came and told you that there was a fire?

A. Yes, I saw him after, I would say half an hour after the walls had started to collapse on the building.

Q. Did you know his name at that time?

A. No, I did not. I really did not know who the man was that was working back there at that time.

Q. Was it the same man that came and told you the fire started? A. Yes.

Q. Did you have a conversation with him at that time?

A. Well, not much of a conversation, no.

Q. Was there anybody else present?

A. Well, there was about twenty standing around there, and I did not speak to [176] any one of them particularly.

(Testimony of W. R. Kissell.)

Q. Did you say anything to Mr. McGrew at that time?

A. No, I did not at the time.

Q. Did he say anything to you?

A. Yes, he came up and started to talk to me.

Q. What did he say to you?

A. I don't remember just exactly the words he used, but he said he hated to see the place burn down, it was quite a mess.

Q. Did he say anything else?

A. So I said, "It sure is." Then he told me that he was the man that was working there, and I said, "Were you?" and he said, "Yes." And I said, "I wonder how that thing got started." And he said, "Well, it looks to me like it started there, right where I was cutting or close to where I was cutting with the torch," as near as he could tell.

Q. Did he say anything else to you?

A. That is all he said.

Q. Have you had any conversation with Mr. McGrew since that time?

A. No, I have never seen the man until today.

Mr. Miller: That is all.

Cross Examination

Mr. Getz: Q. Mr. Kissell, do you know who engaged the Burns Detective Agency to guard this Ice Palace?

A. I don't know positively, no.

The Court: Is there any dispute about that, who employed the Burns Detective Agency? [177]

(Testimony of W. R. Kissell.)

Mr. Miller: I understand there may be, but I didn't think there was.

Mr. Getz: Perhaps counsel will stipulate. Is it stipulated that the Burns Detective Agency was hired at the instance and request of the Defense Supplies Corporation through the Lawrence Warehouse Company, that is, the Lawrence Warehouse Company actually made the arrangements and the Defense Supplies Corporation paid the cost of that guarding?

Mr. Miller: No, that is not true. The Defense Supplies Corporation did not pay the Burns Detective Agency for guarding.

Mr. Getz: They reimbursed the Lawrence Warehouse Company for the cost of the guarding.

Mr. Miller: We will stipulate that the guards were employees of the Burns Detective Agency; that arrangements were made with the Burns Detective Agency by the Lawrence Warehouse Company at the request of the Defense Supplies Corporation; that the Burns Detective Agency was paid by Lawrence Warehouse Company, and that Defense Supplies Corporation reimbursed the Lawrence Warehouse Company for the cost of the guard service. Is that correct?

Mr. Getz: Is it further stipulated that the duties of the guards were prescribed by the Defense Supplies Corporation and transmitted through the Lawrence Warehouse Company?

Mr. Miller: No, it is not so stipulated. I do not [178] understand that to be the fact.

(Testimony of W. R. Kissell.)

Mr. Getz: Is it stipulated that the number of guards and the number of hours of work were prescribed by the Defense Supplies Corporation?

Mr. Miller: No, that is not our understanding.

Mr. Wallace: Let me see if I can clarify the situation. The Defense Supplies Corporation requested a 24-hour guard established. They did not prescribed the hours of any particular guard; the just wanted 24-hour guard service. The Lawrence Warehouse Company employed the Burns Detective Agency, and paid them, and the Defense Supplies Corporation reimbursed Lawrence Warehouse Company.

The Court: Does that clear that up?

Mr. Getz: Yes. Will you stipulate that the Capitol Chevrolet Company had nothing to do with the hiring of the guards or the prescribing of their duties?

Mr. Miller: I don't know.

Mr. Wallace: There is one further thing. I think the Burns Detective Agency as a guard was approved by the RFC.

Mr. Miller: We will stipulate the RFC approved the Burns Detective Agency as an agency.

Mr. Getz: Q. Now, Mr. Kissell, you were not in any way employed by the Capitol Chevrolet Company, were you? A. No.

Q. They had no authority over you whatsoever?

A. No.

Q. As far as you know, there were some instruc-

(Testimony of W. R. Kissell.)

tions given, [179] but those instructions were not given to you?

A. They were not given to me personally, no.

Q. You did not see any written instructions of the Capitol Chevrolet Company?

A. Yes, I did.

Q. Did you yourself? A. Yes.

Q. Have you got them?

A. No, I have not. They burned up in the fire.

Q. Burned up in the fire? A. Yes.

Q. Was that in the form of a card?

A. Yes, a card, that there would be men there in order to take that steel out of the engine room. That was all there was to it.

Q. That is your recollection at this time. Isn't it true that the card stated that Mr. Sanchez was authorized to enter the Ice Palace for the purpose of removing some pipe and equipment?

A. Well, it was not the Ice Palace; it was the engine room. There was nothing said about entering the inside of the Ice Palace on the card.

Q. You were sure it said something about the engine room, that the card said that?

A. Yes.

Q. When did you see that card?

A. I think it was the day before the fire.

Q. The day before the fire?

A. Yes.

Q. When was the first time that you went to work on the day shift?

A. Well, I had been there just a week.

(Testimony of W. K. Kissell.)

Q. On the day shift? A. Yes. [180].

Q. Don't you recall, or do you recall the occasion that Mr. Sanchez first came with that card that he was going to remove some pipe or wanted to remove some pipe?

A. No, he did not while I was on duty.

Q. He did not come while you were on duty?

A. No.

Q. That could have been before you went on daytime?

A. No, I was on daytime; he could have come there in the afternoon after four o'clock, after I went away. I think he presented the card to Mr. Samson.

Q. That was the man that relieved you?

A. Yes.

Q. At four o'clock? A. Yes.

Q. Now, you had never heard the name of McGrew? A. I had not.

Q. Prior to the time of the fire? A. No.

Q. You had a list of the persons who were eligible to go into the building, did you not?

A. Yes.

Q. That list was furnished to you by Mr. Baxter of the Defense Supplies Corporation, was it not?

A. Well, Mr. Harris gave me the list. I do not recall seeing Mr. Baxter until after the fire myself.

Q. Mr. Harris furnished you with that list?

A. Yes.

Q. The names of Mr. Henry and Mr. Parella were on that list as owners of the building?

(Testimony of W. R. Kissell.)

A. Yes.

Q. And there were the names of the other men who were pilers who were authorized to go in there?

A. Yes. [181]

Q. Do you recall that either the first day or the second day before the fire that somebody came and asked to get into the building, asked Mr. Gerhart of the Capitol Chevrolet Company to go into the building and remove some pipe? Were you present at that time?

A. I don't remember anybody ever coming and asking Mr. Gerhart anything, myself.

Q. Do you remember the fire-door that was between the Palace and the engine room?

A. Yes.

Q. That door was boarded up, was it not?

A. Yes.

Q. That was a metal-lined door?

A. It was a wood door covered with tin.

Q. With some kind of sheet metal?

A. Yes.

Q. That was boarded up and tires were piled against it, were they not? A. Yes.

Q. So there was no possibility of entering into the Ice Palace through that door?

A. No, there was not.

Q. The wall between the engine room and the Ice Palace where the engine room abutted against the Ice Palace was a concrete wall?

A. That is right.

Q. Clear across? A. Yes.

(Testimony of W. R. Kissell.)

Q. Now, do you recall Mr. Gerhart saying to some men who wanted to go in they could not go through that door, it was boarded up and there were tires against it and they could not come into the building? Do you recall his saying that to somebody?

A. I don't recall him saying that. [182]

Mr. Wallace: I do not understand the door was boarded up. I understand there was a fire-door which was locked.

The Witness: There were two boards nailed across the door inside of the main building.

Mr. Getz: Q. Inside of the main building, so that it could not be opened?

A. It could not be opened from the outside.

Q. The tires were piled up against it?

A. That is correct.

Q. These men that were there on the day of the fire and the previous day were not in the building where the tires were stored?

A. No, they were not.

Q. They were not in the main building?

A. They were on the south side of the building; they were not in the main building at all.

Q. There were no tires of any kind in the engine room, were there? A. No.

Q. Now, you say you had a talk with Mr. McGrew later that afternoon. Could that have been one of the other men and not Mr. McGrew that you talked to?

A. No; it was Mr. McGrew. He told me his

(Testimony of W. R. Kissell.)

name was McGrew. That was the first I knew who he was.

Q. You wrote a report that same evening, didn't you? You wrote a written report of what occurred on that same night? A. Yes.

Mr. Getz: Have you got the original of that report?

Mr. Miller: We have a copy of that here.

Mr. Getz: Q. Have you got a copy of that report? A. Yes.

Q. With you? A. Yes.

Q. Will you refer to the report, Mr. Kissell, and state whether or not you mentioned anything about the conversation that you had with Mr. McGrew. I will withdraw that question.

I will call your attention to the report and to the fourth paragraph and to these words:

"After the fire I gathered the information from one of these men that the fire started from the acetylene torch."

Is that the way your report read? A. Yes.

Q. You didn't know at that time which man you had talked to, did you?

A. He told me that his name was McGrew, that he was one of the men back there.

Q. He told you that before you wrote this report?

A. Oh, yes. That was while the fire was still burning.

Q. You wrote the report the following day, did you not?

(Testimony of W. R. Kissell.)

A. Yes. I went and told Mr. Keenan that evening after I left there what Mr. McGrew had told me.

Q. This engine room outside of which or in which the men were working was in the rear of the building, was it not? A. Yes.

Q. It was not near any of the entrances that were being used for the admission of tires, was it?

A. We used one of the entrances right close to that fire-wall.

Q. That was before this occurred?

A. Oh, yes, that was a [184] week before that occured, or more.

Q. During April 8 and 9, at the time these men were working around this engine room, that side of the building was not being used in any way by the Capitol Chevrolet Company men in loading these tires? A. No.

Q. They were on the other side?

A. They were using the two doors on the east side of the building.

Q. When you say "they," you mean the men were working outside of the building, is that right?

A. What do you mean?

Q. The men were working outside of the building when you talked to them?

A. The Chevrolet men?

Q. No, Mr. McGrew and the other man.

A. They were in that engine room.

Q. They were in the engine room when you saw them? A. Yes.

(Testimony of W. R. Kissell.)

Q. You saw them using the torch?

A. Yes, the torch was running when I was around there, around 11:30.

Q. You did not stop them from using it; you just cautioned them?

A. That is all, because I could not stay away from the front doorway too long a time. I was the watchman to stop people from coming in there.

Q. You just cautioned them to be careful with the torch? A. That is right.

Q. At the time of the fire were there any of the Capitol Chevrolet men in the Ice Palace?

A. No, there was not.

Q. They had left some time before for lunch?

A. Yes. [185]

Mr. Getz: That is all.

The Court: Is there anything else with this witness?

Mr. Miller: I would like to ask one question.

Q. Mr. Kissel, you have testified that you made a report. To whom did you make your report?

A. Mr. Harris of the William J. Burns Detective Agency.

The Court: Q. He is your superior officer?

A. Yes.

Mr. Miller: Do you have any objection to this report going in?

Mr. Gommo: Yes.

Mr. Miller: We were never furnished with the original report. This is the letter from Burns Detective Agency written to Lawrence Warehouse

(Testimony of W. R. Kissell.)

Company. A copy of that letter was sent to Defense Supplies Corporation and attached to it was a copy of the report. The letter from the Burns Detective Agency states that this is an exact copy of an original report sent by Mr. Kissell, the original being on file in their office.

Mr. Getz: I have no objection so far as my client is concerned.

Mr. Gommo: I am going to object to it as being hearsay statements.

The Court: Is it any different from the testimony that was given?

Mr. Wallace: No, I do not see that it would add anything. It does contain some hearsay. [186]

The Court: There is no point in offering in evidence the original report if the witness testified to the same thing. We will take a brief recess at this time.

(Recess.)

By Mr. Gommo:

Q. Mr. Kissel, you were the only watchman on duty at the time that you testfied to on April 9, 1943?

A. No, there were two others. I was the only one on that day.

Q. I mean during that particular time you went on duty at eight o'clock in the morning and remained until four o'clock in the afternoon?

A. Yes.

Q. During the time from eight in the morning

(Testimony of W. R. Kissell.)

to four in the afternoon you were the only watchman on duty, in that correct? A. Yes.

Q. During the time that you were on duty, where did you usually stay?

A. Well, at the northeast corner of the building.

Q. The northeast corner of the building?

A. Yes.

Q. Had you an office there?

A. There was an office there

Q. What type of an office is that?

A. It was about 10 by 12, which was used for a ticket office when the ice rink was running.

Q. Did that have wooden walls?

A. Yes.

Q. Did it have any glass in it?

A. Yes.

Q. And on which side?

A. On the east side.

Q. On the east side facing the outside?

A. Yes.

Q. And are there any glass panes or openings in that office looking to the inside of the building?

A. There was [187] a door? A. Yes.

Q. Did you keep that door closed?

A. No.

Q The door remained open at all times?

A. Yes.

Q. Where did you sit in that room with respect to the door?

A. I did not do very much sitting when I was on my duty. I walked around all the time in the

(Testimony of W. R. Kissell.)

building, somewhere around the building where I could see on either side.

Q. Now, then, you say you visited the engine room about 11:30, is that correct?

A. I would say about 11:30, yes.

Q. After visiting the engine room you then walked back to your office?

A. Yes, practically back to it, not into it.

Q. You walked down the west side of the building, is that it? A. Yes.

Q. Then you went into the building?

A. I went in the building in the west door, the door toward the north on the west side.

Q. Did you go back and eat your lunch at that time?

A. I did not eat my lunch, no, until after Mr. Gerhart came there around 12 o'clock.

Q. Then you proceeded to eat your lunch?

A. Yes.

Q. When was the last time that you had made a complete circle of the building for the purpose of inspecting the general conditions?

A. Well, I would say about 10 minutes to 12.

Q. And you had not been on the outside of the building after that?

A. Other than just going out to the car and getting [188] my lunch.

Q. Now, then, are you familiar with the fence that is constructed on the south end of the building?

A. Yes.

Q. Would you describe that fence?

(Testimony of W. R. Kissell.)

A. Well, it was fastened on the southeast corner of the engine room and ran from these east, and from there there was no fence going to the main building, about 30 feet from the corner of the building.

Q. There was a 30-foot opening?

A. There was a fence lacking 30 feet extending the length of the building.

The Court: You mean by that at the point where the fence met the building there were 30 feet more of the main building?

A. Yes, about 30 feet more of the building.

By Mr. Gommo:

Q. It did not go right to the southeast corner of the building?

A. No, it lacked 30 feet extending out to the southeast corner.

Q. How high was that fence?

A. About six feet.

Q. Were you able to look over it?

A. I never did, no.

Q. You say while you were talking to somebody of the Chevrolet that was the first time you actually saw the fire; while you were talking on the telephone to somebody of the Capitol Chevrolet Company, that was the first time that you saw the fire?

A. The first indication that I saw of any fire, yes.

Q. You say that you saw the fire on the south wall, is that correct? A. Yes.

Q. And where was the fire?

(Testimony of W. R. Kissell.)

A. I would say about eight or [189] ten feet east of the concrete fire-wall on the south end.

Q. How much of a fire was it at that time?

A. Well, as far as I could tell, there was a bleacher stand there, if you know, that ran pretty near to the ceiling for people to sit in, and the fire was in behind that burning up the outside wall. I could not tell you how far back, but there was fire there, because smoke and fire was coming out of the windows.

Q. And there was this space of eight or ten feet from the fire-wall where there was no fire?

A. I could not tell you that, but that is where the main part of the fire was, above the bleachers, because I could not see the fire-wall, because it was all covered with bleachers; the bleachers were all around three sides of the building, the west side, east side, and south side.

Q. There could have been a fire even before that and you would not have been able to see it by reason of those bleachers?

A. There could possibly have been, and it be outside, and I would not have seen it there; that is right.

Q. You say you never looked over this fence at any time?

A. I never examined that fence, no.

By Mr. Getz:

Q. May I ask another question? Referring again to the order that you saw, you only saw one order?

A. That is all I saw.

(Testimony of W. R. Kissell.)

Q. Just one? A. Yes. [190]

Q. There was only one order that you saw?

A. Yes.

By Mr. Gommo:

Q. Might I ask one more question? Was there any other fence or physical obstruction surrounding this building other than this wall?

A. No, you could see the full length of the building on all four sides, that is, on the east side or west side there was no obstruction. There was a little shed set off about 4 or 5 or 6 feet away from the building, I would say possibly 8x10, they used for storing their ice scraper there.

Q. That was located near the west door of the engine room, is that correct?

A. Pretty close to the west door of the engine room.

Q. It was north of it?

A. Yes, it was a little north.

Q. The space from the highway to the north end of Ice Palace is a clear, open space, is that right? A. Yes.

Q. And the area to the west, east and south is clear, open space? A. Yes.

Q. In fact, to the south there is a large field there? A. Yes.

Q. There is nothing to obstruct other persons from approaching the Ice Palace from any one of those directions?

A. Nothing that I know of.

Mr. Gommo: That is all.

Mr. Miller: Your Honor, this witness is from Sacramento and he would like to return to Sacramento tonight if he could. Is there any objection to his being excused? [191]

The Court: Do counsel have any further questions of this witness?

Mr. Wallace: Not as far as we are concerned.

Mr. Getz: No.

Mr. Glicksberg: No.

Mr. Gomme: No.

The Court: Very well. He may be excused.

Mr. Miller: We also have here under subpoena Mr. Sanchez, and we do not intend to call Mr. Sanchez, and ask that he be excused unless some of the attorneys want him.

Mr. Getz: No, we want him here.

The Court: Do you wish him here?

Mr. Getz: Yes.

Mr. Miller: That is all the testimony we propose to put on, but Mr. Getz asked that we have Mr. McClellan come back for a few questions which he would like to ask him. Is that right?

Mr. Getz: I would like to clarify something.

The Court: Is there any stipulation that these tires were all destroyed by the fire? You have all been talking about the fact that they were destroyed, but I do not see anything of record about that.

Mr. Miller: I think we can agree they were all destroyed.

Mr. Getz: I think we could possibly stipulate that the tires which were in the building were de-

stroyed by fire, [192] whatever tires they had in there.

Mr. Miller: It is stipulated that whatever was in the building was destroyed by fire?

Mr. Getz: Yes. Before the plaintiff closes I would like to ask Mr. McClellan a few questions.

ALFRED D. McCLELLAN

recalled; previously sworn.

Cross-Examination

By Mr. Getz:

Q. Mr. McClellan, I believe that you testified on direct examination that the prices in the price list, Plaintiff's Exhibit 4, were OPA ceiling prices?

A. That is correct.

Q. I want to give you an opportunity to correct that. I am not trying to lead you into a trap or to impeach you, but I would like to see if you were mistaken. I will ask you to examine this OPA price regulation and the four grades shown there. Now, I will call your attention to Table IV in your instructions.

Mr. Wallace: That is Plaintiff's Exhibit No. 4?

Mr. Getz: Plaintiff's Exhibit 4.

Mr. Wallace: That is the used tire list?

Mr. Getz: The used tire list.

Q. Will you turn to the page that you find $2.75. First turn to grades 1, 2, 3, and 4. I believe they are on the same sheet, [193] are they not?

(Testimony of Alfred D. McClellan.)

A. Yes.

Q. Now, I will read the description at the head of the column and you compare it with the OPA price list. "Tires retaining 7/32 inches or more tread design depth, when measured the shallowed point." That is your grade 1? A. Yes.

Q. The second is, "Tires retaining more than 3/32 inches but less than 7/32 inches tread design depth, when measured at the shallowest point." That is grade 2? A. Yes.

Q. Now, what is the price for your 3.75 - 18 in the OPA in grade 1? A. $4.50.

Q. What is price for grade 2? A. $3.63.

Q. What is price for grade 3? A. $2.45.

Q. What is price in the list for grade 3?

A. $2.75 on that one.

Q. Now, then, in the column, "Deduct this amount for each vulcanized spot repair needed," what do you have in the OPA column?

A. Nothing on that at all.

Q. Now turn to the grade 4, the one which you had the $2.75 and 90 cents. Now, referring to your grade 4 in the same list, the OPA list, look at it, and I will read the one in the list and see if it coincides: "Tires with smooth treads and other basic tire carcasses in a sound condition or repaired, if not sound." Is that the same?

A. "Tires with smooth treads and other basic tire carcasses."

Q. That is Grade 4 in the OPA and Grade 4 in your list? [194]

(Testimony of Alfred D. McClellan.)

A. I believe it is.

Q. Your price for 3.75-18 was how much?

A. $2.75.

Q. What is the OPA price?

A. $1.50. These prices have been changed from time to time by the OPA.

Q. But there was no change in these prices from the time they were adopted until April 9, 1943?

A. There was.

Q. I have all of the amendments. I want to call the Court's attention also to the fact that the regulation prohibits the payment of more than the maximum price by any person, and that the definition of the word "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States, or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing. Now, I would like to offer in evidence Revised Price Schedule No. 63, which is Maximum Price Regulation No. 107, for used tires and tubes.

Mr. Miller: We will object to that going in evidence unless it is shown that that regulation was in effect during the time these tires were acquired by the Defense Supplies Corporation.

Mr. Getz: The burden is not on me; that is up to counsel for the government. This is a regulation promulgated by the United States Government. [195]

(Testimony of Alfred D. McClellan.)

The Court: It would not be the burden of the plaintiff to show what the OPA regulation was.

Mr. Getz: Yes, because the plaintiff is attempting to show damage, and to show a measure of damage, and the price I show is by the OPA regulation.

Mr. Miller: I have no objection to the OPA regulation going in if the regulation that goes in is a regulation that was in effect at the time Defense Supplies Corporation was issuing this schedule and buying these tires. That is my only objection.

Mr. Getz: I will make this statement to counsel, that we asked for all the amendments, and they do not affect that particular classification.

The Court: I thought there was already in evidence the OPA ceiling price—I though that was Exhibits 4 and 5.

Mr. Getz: No, that is what I am showing—No. 4 was the schedule for used tires, and No. 5 the schedule for new tires, and I understood that was the ceiling price as applied in the Defense Supplies Corporation's schedule of prices. Mr. McClellan inadvertently said it was the ceiling price, and I proved by him they are not, because there is a deviation, and the lowest price of a No. 4 grade tire instead of being $2.75 was $1.50, under the OPA schedule.

The Witness: I checked to determine whether that price was in effect at the time, and that regulation you have there was changed. [196]

(Testimony of Alfred D. McClellan.)

Q. Mr. McClellan, will you give me the date and number?

A. I will have to check it and get it. I have not it with me now.

The Court: You may not have the right OPA ceiling price.

Mr. Getz: They gave me all of the amendments.

The Witness: I will get you a copy of it.

Mr. Miller: We still do not think that this OPA schedule that is now being ~~offered was~~ the schedule in effect when these tires were acquired by the Defense Supplies Corporation.

Mr. Getz: We have a presumption, at least, that it is presumed a fact until the contrary is shown.

Mr. Miller: I think the Court will take judicial notice of the fact that OPA regulations are changed frequently.

The Court: I think you will have to get somebody from the OPA to show what the OPA ceiling price was, if it was different from that testified to by the witness on that one particular grade, there, grade 4.

Mr. Getz: There were two variations, grade 3 and grade 4.

Mr. Wallace: The regulation shows the date of its various issues. The first of its issues was December 30, 1941, the second March 7, 1942, and the third January 31, 1942.

The Court: When were these purchases made?

Mr. Getz: October, 1942.

(Testimony of Alfred D. McClellan.)

Mr. Miller: October 15, 1942.

Mr. Getz: That was a date subsequent to the time when they were purchased. [197]

The Court: Prior to that.

Mr. Getz: Oh, yes. I beg your pardon; that is correct.

The Court: I think you will have to show that that regulation you have there was in effect at the time. I do not know how you are going to be able to do that, that is up to counsel to decide. I think you would get some more definite form of proof if you want that in evidence.

Mr. Getz: I am willing for the moment to rest on the fact that I have shown a discrepancy.

The Court: I do not want you to be misled. I do not think the Court would be justified in accepting that as a discrepancy unless it appears by some competent evidence that that document that you have read was the ceiling price which was in effect at the time that these purchases were made.

Mr. Getz: I offer it in evidence for the purpose of showing it was in effect on January 31, 1942.

The Court: You may offer it for that purpose, but it would not show the point that you are attempting to show.

Mr. Getz: I think it would. I think it is presumed a fact until the contrary is shown. I do not think the burden is on me to show it was amended. I did make an effort to obtain all of the amendments, and as far as I know they furnished me with them, and there has been no change

(Testimony of Alfred D. McClellan.)

in this respect, and I would like to offer it for the purpose of showing it was in effect in January, 1942. [198]

The Court: It may be admitted.

(The Revised Price Schedule No. 63 is marked Defendants' Exhibit B.)

The Court: Anything else with this witness?

Mr. Getz: No.

Mr. Miller: Plaintiff rests, your Honor.

(Plaintiff rests.)

Mr. Hughes: If your Honor please, I think on the evidence that has been introduced by the plaintiff in this case that counsel for the government will not seriously resist the motion which I now make on behalf of the defendant Constantine Parella, that this proceeding be dismissed as to him. The grounds of the motion are that——

The Court: I do not think you need to state the gounds.

Mr. Miller: We will not resist the motion, your Honor. It does not seem to me that there was any evidence as to the defendant Parella.

The Court: The action may be dismissed as to the defendant Parella.

Mr. Glicksberg: May we likewise have the same motion as to the defendant Elmore?

Mr. Miller: We will not resist the motion so far as the defendant Elmore is concerned.

The Court: He was the employee of West Sacramento Water Company? [199]

Mr. Miller: Yes.

The Court: Very well, the action may be dismissed as to the defendant Elmore.

Mr. Wallace: If your Honor please, I at this time move for judgment for the defendant Lawrence Warehouse Company on the ground that there is no evidence in the record to indicate in any manner any fault on the part of the Lawrence Warehouse Company to exercise the degree of care that a reasonable man would use in connection with any acts in so far as they had any relationship to these tires.

(Thereupon counsel argued the motion, at the conclusion of which an adjournment was taken until Thursday, February 15, at 10:00 o'clock a.m.) [200]

Thursday, February 15, 1945, 10:00 o'clock a.m.

Mr. Getz: If your Honor please, for the purpose of the record, on behalf of the defendant Capitol Chevrolet Company, I move for a judgment of nonsuit on the ground that the plaintiff has utterly failed to show any negligence on the part of the Capitol Chevrolet Company, or in any way connecting the Capitol Chevrolet Company with the damage.

(Counsel thereupon argued the motion.)

Mr. Glicksberg: If your Honor please, the motion for judgment on behalf of Clyde Henry is based upon three grounds, first of all that the record

is completely devoid of any evidence of employer and employee arrangement; assuming secondly for the purpose of this argument that there is an employment, that there is no evidence of negligence, and, third, that there is entirely an utter failure of proof of damages, assuming the first two grounds be incorrect.

(Thereupon counsel argued the motion.)

Mr. Gommo: If your Honor please, in behalf of the defendant McGrew, at this time I make a motion for judgment based upon the evidence as it now stands. The motion is based on two grounds, first, Did the actions of McGrew cause the fire, and, second, assuming that his actions did cause the fire, were his actions negligence, and that negligence the proximate cause of the fire?

(Thereupon counsel proceeded to argue the motion.) [201].

The Court: Let me ask you this, would the situation as far as the determination of the issue be greatly different as far as the defendants are concerned if the defendants were to submit evidence?

Mr. Getz: I believe all counsel agree that should the court deny the motion all counsel will rest and submit it on the evidence before the Court.

The Court: We will be in recess until 2:00 o'clock and counsel can talk the matter over.

Afternoon Session, 2:00 o'clock p.m.

Mr. Getz: If your Honor please, we had a very extensive discussion between counsel for the defendants, and we feel that with the evidence offered at this time we will not offer any evidence, and we shall proceed to the argument, if that is satisfactory to the Court.

The Court: Then the Court will decide the case on the basis of the mtoions that have been made?

Mr. Getz: That is right, your Honor.

(Thereupon counsel argued the case.) [202]

PLAINTIFF'S EXHIBIT No. 1

Defense Supplies Corporation
200 Bush Street
San Francisco, California

March 1, 1943

Lawrence Warehouse Company
37 Drumm Street
San Francisco, California

Gentlemen:

You have offered to the Defense Supplies Corporation, which is acting for the United States Government, the facilities of your warehouse for the storage of tires and/or tubes acquired by us under the 'Consumer Tire Purchase Plan". In order to standardize our records and simplify the procedure under this Plan, you will issue receipts for tires and/or tubes delivered to you for our account by

signing the appropriate section of our Form DS-T 24, one of which will accompany each lot of tires and/or tubes delivered to you. Your signature to this receipt will constitute an agreement that the tires and/or tubes are accepted by you for storage in accordance with the following conditions:

1. Tires and/or tubes will be stored in the building owned or leased by you and located at West Sacramento one mile West of the Sacramento River on the Davis Highway (known as the Ice Palace) in a manner compatible with the instructions contained in DSC Form 28, a copy of which it attached hereto.

2. Tires and/or tubes stored by you for the account of Defense Supplies Corporation will be segregated from all other such goods in your warehouse, and such records will be kept by you as are necessary to identify them as the property of Defense Supplies Corporation.

3. Tires and/or tubes delivered to you for our account will be accepted by you and receipts therefor on Form DS-T 24, will be forwarded daily to Federal Reserve Bank of San Francisco, San Francisco, California.

We will furnish you franked envelopes, requiring no postage, for this purpose.

4. You will inspect the tires and/or tubes stored by you at frequent intervals not less than 10 days apart, and should any change be noted by you in the conditions surrounding them which might lead

to their deterioration, you will immediately make every effort to correct such conditions and will immediately report the circumstance relating to the change of condition to this Agency of Defense Supplies Corporation.

5. You will bill to Defense Supplies Corporation at the end of each month warehouse charges as follows:

(a) A charge of 3c per tire on all tires, whether on hand in your warehouse at the first of the month or received by you during the month.

(b) A charge of 3c per tire on all tires received during the month to cover your charge for services for receipt and subsequent delivery (in-and-out charge).

(c) A charge of 1c per tube on all tubes whether on hand in your warehouse at the first of the month or received by you during the month.

(d) A charge of 1c per tube on all tubes received during the month to cover your charge for services for receipt and subsequent delivery (in-and-out charge).

6. You will provide without charge any materials required properly to store and segregate the tires and/or tubes in your warehouse in accordance with the instructions attached hereto (DSC Form 28).

7. Tires and/or tubes stored by you will be delivered on the written order of Defense Supplies Corporation. It is understood that you will not be

required to deliver any individual tire and/or tube either by serial number or otherwise, but that upon receipt of an order for delivery you may deliver any tire or tube in storage which is of the size, type, and classification named in order.

8. There will be no charge made by you for delivery to trucks or railroad cars, which will be provided by Defense Supplies Corporation at the loading platform of your warehouse.

9. You will provide when required, without charge to Defense Supplies Corporation, suitable space in your warehouse for the inspection, sorting and classification of the tires and/or tubes delivered to you for the account of Defense Supplies Corporation. This work will be done by appraisers properly authorized by Defense Supplies Corporation.

10. You will grant properly identified agents or employees of Defense Supplies Corporation the right of access to tires and/or tubes stored by you at any time during your regular business hours. No tire and/or tube may, however, be removed from your warehouse without a written order.

11. Neither you nor Defense Supplies Corporation will be liable for failure to perform under this agreement due to causes beyond the control and without the fault or negligence of the defaulting party, including, but not restricted to, acts of God or of the public enemy, acts or orders of the Government, floods, fires, strikes, freight embargoes and unavailability, or delays in the delivery of any material in the care for or servicing of tires or tubes stored

or delivered hereunder. Your general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in your state and to the exercise of ordinary care on your part.

12. You will not under any circumstances cause or suffer a lien of any kind to accrue against any property of Defense Supplies Corporation while it is in your possession.

13. Warehouseman warrants that if it is a corporation, this agreement is entered into with it for its general benefit, and that, in any event, no Member of, or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this agreement, nor to any benefit that may arise therefrom, in violation of the laws of the United States covering such matters, that it will comply with, and give all stipulations and representations required by applicable Federal Laws and will require similar compliance, representations and stipulations with respect to any contract entered into by it with others incidental to or in connection with this agreement and further that in the performance of this agreement, Warehousemen will not discriminate against any employee solely because of race, color, creed or national origin, and will comply with all laws relating to fair standards of wages and hours for labor in so far as they may be applicable to this agreement.

Your signature to the copy of this letter sent you herewith evidences your acceptance of the terms

of this letter as constituting the agreement with Defense Supplies Corporation for the storage of tires and/or tubes.

Very truly yours,
/s/ J. M. McKEE,
Agent, Defense Supplies Corporation.

Accepted:

.....
(Warehouse)
By LAWRENCE WAREHOUSE COMPANY,
/s/ W. G. HANLEY,
Asst. V. P.

[Endorsed]: Filed U.S.D.C. Feb. 13, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFF'S EXHIBIT No. 2

INSTRUCTIONS FOR WAREHOUSING TIRES AND TUBES RECEIVED FOR ACCOUNT OF DEFENSE SUPPLIES CORPORATION

The following instructions are to be followed insofar as it is reasonably possible.

a. Light. Storage room should be dark or at least have a complete absence of direct sunlight. If there are any windows, they are to be covered or painted with blue paint. The latter will provide

indirect lighting in the day time, which is not injurious.

b. Temperature. Low temperatures are not objectionable but high room temperatures, i.e., over 80 degree Fahrenheit, are detrimental and should be avoided if possible.

c. Oil. Care should be taken that tires do not come in contact with oil in any manner, either by dripping or oil soaked floors. Tires should be kept off oil soaked floors. Oil is a natural enemy of rubber and causes it to disintegrate rapidly.

d. Moisture. Excessive moisture should be avoided and the tires should not be allowed to stand in water, in the event of a leaky roof or water pipe.

e. Air. A strong air current should be avoided, as this increases the supply of oxygen. Also, air currents sometimes carry ozone, which causes rapid aging.

f. New Tires are to be segregated by size, and insofar as possible by make, or brand and type. The extent to which this separation is carried out will depend on the number stored but should be sufficient to allow the warehouseman to deliver, on order, tires of a specific description, without unnecessary labor or time. Information as to description of new tires will be found on the side of the tire if unwrapped, and if wrapped, on the attached label. Wrapped tires are to be opened only if necessary to determine condition.

g. Used Tires will be crayon marked or labelled

by the appraiser when inspected, showing size, whether passenger car or truck, and condition class (by one of five numbers). They are to be segregated in accordance with these classifications and without regard to make or brand. The extent of separation should be such as to allow a given size and classification to be delivered on order without undue difficulty.

h. Tires to be repaired will be crayon marked by class 1 to 5, showing the amount of repair; for example, "1-R-50", "3-R-2.50", etc. They are to be segregated in accordance with the foregoing paragraph (g) except no segregation as to repair costs.)

i. New Tubes are to be stored by size, type, and brand. This description will either appear on the box or will be placed on a label attached by the appraiser.

j. Used tubes are to be segregated by size, and type but without regard to make or brand. Tubes, after appraisal, will be properly deflated, folded, tied and labelled by the appraiser. Tubes should be thoroughly dried after inspection before being put into storage.

k. Tubes to be repaired will be labelled and repair cost shown (R-50) etc. as in paragraph (h) and stored as in paragraph (j).

l. Stacking. The number of tires it is practicable to stack in a pile depends largely on the size, since with heavy truck tires weight is a consideration in lifting the tire onto the pile, and

care should be taken in the distribution of weight on a warehouse floor to avoid exceeding its capacity.

Generally speaking it is practicable to pile tires within the following limits.

1. Passenger Car Tires. Stack as high as space will allow without crushing the bottom tires. It is suggested that a worn-out tire (junk) be used as the base of a pile to protect the bottom good tire from excessive moisture, grease, oil, or other injurious matter which may be on the surface of the floor, and also to cushion the bottom good tire against crushing. If a junk tire is not available, clean boards, or cardboard can be used. (The usual sizes of tires may be stacked 15 to 20 deep according to this procedure.) Under no circumstances should tires of larger size or greater weight be piled on small sizes.

2. Truck Tires. Piles as high as weight and convenience of removing will allow without crushing the bottom tires. The base of the pile should be protected as suggested above. Note: In order to prevent high piles of tires from toppling over, thin wooden slats should be used about 10 tires apart inserted between the tires at the outside edge to stabilize the stacks and tie them together. In this manner higher piles can be maintained without sway or falling down. Wrapped tires should be stacked keeping labels facing the aisles and in alignment with every fifth tire having its label out of alignment. This will facilitate checking inventory.

m. Tubes may be received in individual cartons

or boxes and when so stored may be stacked as high as the strength of the boxes will permit and with the labelled side or end facing the outside of the stack for identification.

Tubes received without boxes or cartons will be folded and tied by appraiser and should be stored in bulk in boxes or containers which will allow segregation by classes as provided in Instruction (i) above. Containers should be labelled with size and type for identification.

n. Tires and tubes will be received at the warehouse from the Railway Express Agent, who, at the owner's request has been authorized to pick-up and deliver at the expense of DSC. Tires and tubes also may be delivered directly to the warehouse by the owner. Tires and tubes delivered by the Railway Express Agency will be accompanied by Form DS-T-24.

o. The form received with the tires delivered by the Railway Express Agency will be filled out by the appraiser before the tires are put into storage. On this form appears a warehouse receipt and the warehouseman will sign the original and will retain copy No. 2 of the form for his records sending the signed original and copy No. 3 (of which a portion had been detached previously) to the Federal Reserve Bank or branch specified in the warehouse contract. For this purpose franked envelopes will be provided and a form to list the number of receipts transmitted. These forms should be sent daily.

p. When tires are delivered to the warehouse by the owners, if the appraiser is available the owner should be referred to him for assistance in filling out Form DS-T-24. Copies of that form and instructions will be sent to you for your use and the use of the appraiser. If the appraiser is not available the warehouseman should assist in filling out the form. If the appraiser completes the form the warehouse receipt may then be signed and the left half of copy No. 3 detached and given the owner for his records. If the appraiser does not complete the form and the description is therefore inadequate for the warehouseman's purposes, the warehouseman may sign for the owner's record in the space provided for the signature of the expressman.

[Endorsed]: Filed U.S.D.C. Feb. 13, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFF'S EXHIBIT No. 3

Capitol Chevrolet Company
Sales and Service
1300 K Street Capital 7002
Sacramento, California

April 10, 1943

Defense Supplies Corporation
200 Bush Street
San Francisco, California

Gentlemen:

As agents for the Lawrence Warehouse Com-

pany storing Defense Supplies Corporation tires and tubes in Sacramento, we are reporting in detail the tires and tubes destroyed by fire on April 9th, 1943, at the Ice Palace.

S T tires in Ice Palace	13,412	
Graded tires in Ice Palace	14,237	
Tires received from Railway Express Agency (not appraised)	580	
		28,229
Tires shipped from Ice Palace for R.M.M.A.		628
Total tires destroyed		27,601
Scrap tubes in Ice Palace—estimated	1,800	
Graded tubes in Ice Palace—estimated	50	
Total tubes destroyed—estimated		1,850

Very truly yours,

CAPITOL CHEVROLET CO.

/s/ G. A. KENYON,

[Endorsed]: Filed U.S.D.C. Feb. 13, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFF'S EXHIBIT No. 6

Lease

This Indenture, Made and executed in duplicate this 1st day of Mareh, 1943, By and Between Clyde W. Henry and C. Parella, hereinafter called the Lessor, and Capitol Chevrolet Company, a California corporation, hereinafter called the Lessee,

Plaintiff's Exhibit No. 6—(continued)

Witnesseth: That, for and in consideration of the payment of the rents and the performance of the covenants contained herein on the part of the Lessee and in the manner hereinafter stated, the Lessor does hereby demise, lease and let to the Lessee and, in consideration of the premises, the Lessee does hereby lease, hire and take from the Lessor upon the terms and conditions hereinafter set forth the following described property and its appurtenances, situate in the County of Yolo, State of California, particularly described as follows, to-wit:

Beginning at a point in the southeasterly line of the California State Highway right of way that extends between Sacramento and Davis and designated as Yolo County Route 6, Section C, said point of beginning being situate North 85° 49' East 1045.47 feet and thence North 73° 45' 30" East 275 feet from the point of intersection of the southerly line of the right of way of said Route 6, Section C with the center line of the State Highway that extends southerly along the East line of Westacres Subdivision in Reclamation District Number 900 as the map of said Subdivision appears of record in the office of the Recorder of Yolo County in Map Book 3 at page 75, and extending thence from said designated point of beginning and at right angles with said southeasterly line of said California State Highway right of way South 16° 14' 30" East a distance of 400 feet to a point; thence South

Plaintiff's Exhibit No. 6—(continued)

73° 50′ West a distance of 125 feet more or less to a point; thence North 19° 20′ 30″ West a distance of 404.89 feet to a point of intersection with the southeasterly line of said California State Highway, Yolo County Route 6, Section C right of way; then along a curve to the left, having a radius of 2050. feet, a total deflection angle of 12° 03′ 30″ and a total length of 641.90 feet, for a distance of 125 feet more or less along said southeasterly line of said Route 6, Section C right of way to the point of beginning.

Term.

For the terms of One (1) Year, commencing on the 1st day of March, 1943, and ending on the 29th day of February, 1944,

Rent.

at and for the total rent or sum of Thirty-Six Hundred ($3600.00) Dollars payable monthly in advance in installments of Three Hundred ($300) Dollars each, in lawful money of the United States of America, on the first day of each and every calendar month.

As further consideration for this lease the Lessee agrees to pay the sum of $300.00 on March 1, 1943, in addition to the monthly installment of rent due on that date, as hereinabove provided, and if all the other terms and conditions of this lease are complied with by the Lessee, then the said sum of $300.00 shall be credited on the last monthly installment of rent due February 1, 1944.

Plaintiff's Exhibit No. 6—(continued)

This lease is made subject to the following terms and conditions:

Payment of Rent.

1. Said Lessee agrees to pay said rents to said Lessor at the times and in the manner herein provided, without any deduction whatever and free of and from any and all claims and demands against said Lessor of any kind or character.

Default and Re-entry.

Removal of Property.

2. Should said Lessee fail to pay any part of the rents herein specified, at the times or in the manner herein provided, or fail faithfully to comply with or perform any other of the terms, conditions, covenants and agreements of this lease on the part of said Lessee to be performed or complied with, then and in that event, said Lessor may, at the option of said Lessor, either enter into and upon and take possession of said leased premises as the agent and for the account of said Lessee, and if said Lessor so elects to lease or rent the whole or any part of said premises for the balance or any part of the term of this lease, and retain all rents thus received, and, after deducting therefrom all expenses incurred in and about the renting of the same and all costs and expenses incurred in the collection of said rents, apply the balance to the payment of the rents payable hereunder by said Lessee; but the performance of all or any of the said acts by the said Lessor shall in nowise

Plaintiff's Exhibit No. 6—(continued)

release or discharge said Lessee from a full and strict compliance with and performance of all the terms, conditions and covenants of this lease on the part of said Lessee to be performed, including the payment of the total amount of rent which said Lessee by the express terms of this lease agrees and promises to pay as rental for said leased premises for and during the whole of the term of this lease; or else said Lessor, at the option of said Lessor, may terminate this lease, or said Lessor may pursue any remedy whatsoever provided for by law, and in any of said events, said Lessor shall be forthwith entitled to the possession of said leased premises, and may enter into and upon said leased premises, without notice to said Lessee, and exclude said Lessee therefrom and from in any manner having access thereto, and remove all persons and property therefrom, and by process of law, or otherwise, take and resume possession of said leased premises, and in the removal of such property, said Lessor shall in nowise be responsible or liable, either to said Lessee, or to any other person whomsoever, for such property or the safe keeping thereof, or for any damage whatsoever thereto or to any part thereof, and said Lessor is hereby further authorized to store such removed property in any warehouse or other place at the expense and for the account of said Lessee.

Use and Uses Prohibited.

3. That said leased premises shall be used, oc-

Plaintiff's Exhibit No. 6—(continued)

cupied and conducted exclusively as and for the storage of tires and for no other purpose, and shall be used, occupied and conducted in a thoroughly orderly and respectable manner, without let, hindrance, annoyance, disturbance, detriment, injury or offense to the Lessor, that said Lessee shall not maintain or commit, nor suffer to be maintained or committed any nuisance or waste in or about said leased premises; that said Lessee shall not do or permit anything to be done in or about the said leased premises, nor bring or keep anything therein, which will in any way affect fire or other insurance on said building or any of its contents, or which shall in any way conflict with any law, ordinance, rule or regulation affecting the occupancy and use of said premises which are or may hereafter be enacted or promulgated by any public authority.

Lessee shall not construct, maintain or permit to be constructed or maintained, any sign or bill board on the roof of the building located on said demised premises, nor paint, nor hang, nor permit or authorize others to paint or hang, any sign on the outside walls thereof, unless written permission so to do be first obtained from the Lessor.

Assignment and Subletting.

4. Said Lessee hereby agrees not to assign this lease or any interest therein, nor let or underlet the whole or any part of said leased premises without the written consent of said Lessor first had and obtained, and that neither this lease, nor any in-

Plaintiff's Exhibit No. 6—(continued)

terest therein shall be assigned or assignable, either by operation of law or otherwise.

Provided also, and these presents are upon this covenant, that if the Lessee do or shall neglect or fail to perform or observe any of the covenants contained in these presents and on its part to be observed and performed for ten (10) days after notice by the Lessor, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty days after notice by Lessor, or if the Lessee shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Lessor lawfully may enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same as of the former estate of the Lessor and expel the Lessee and those claiming under and through it and remove its effects (forcibly if necessary) without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine, and the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the terms above specified.

Plaintiff's Exhibit No. 6—(continued)—

Alterations and Repairs.

5. Said Lessee agrees that the said leased premises are now in tenantable and good order and condition and that said Lessee shall keep and maintain said premises in good and sanitary order and condition, and that no alteration, repair or change whatever shall be made in or about said leased premises without the written consent of the Lessor, said Lessee hereby waiving all rights under the provisions of section 1942 of the Civil Code of the State of California to make repairs at the Lessor's expense, and that unless otherwise provided by written agreement, all alterations, improvements and changes that may be required shall be done by or under the direction of the Lessor but at the cost of the Lessee; that all alterations, additions and improvements made in and to said leased premises shall, unless otherwise provided by written agreement be the property of the Lessor and shall remain upon and be surrendered with said leased premises; that said Lessee shall not mar or deface in any manner the walls, woodwork, or any other part of said leased premises; that all damage or injury done to the premises or property of said Lessor by said Lessee, or by any person who may be in or upon the premises, with the consent of the Lessee shall be paid for by the Lessee at the time the damage or injury is inflicted; and that said Lessee shall, at the termination of this lease, surrender said leased premises to the Lessor in as good order

Plaintiff's Exhibit No. 6—(continued)

and condition as reasonable and proper use thereof will permit.

Delivery of Possession.

6. In the event of the inability of the Lessor to deliver possession of said leased premises at the time herein fixed for the commencement of the term of this lease, neither the Lessor nor the agent of said Lessor shall be liable for any damages caused thereby, nor shall this lease thereby become void or voidable, but in such event the Lessee shall not be liable for any rent until such time as the Lessor can deliver possession.

Notice of Surrender.

7. Said Lessee shall at least thirty days before the date of the expiration of this lease give to said Lessor a written notice of intention to surrender said leased premises on said date; if such notice is not given, then said Lessee shall be liable for rent of one additional month in the event that he shall have vacated said leased premises, at the expiration of the terms of this lease.

Holding Over.

8. If said Lessee holds possession of the said premises after the expiration of the term of this lease, such Lessee shall become a tenant from month to month only upon the terms herein specified, but at a monthly rental of Three Hundred dollars ($300.00) per month payable monthly in advance in said lawful money of the United States on the

Plaintiff's Exhibit No. 6—(continued)

first day of each month and shall continue to be such tenant until such tenancy shall be terminated by the Lessor, or until said Lessee shall have given to said Lessor a written notice at least one month prior to the date of the termination of such monthly tenancy of his intention to terminate such tenancy and shall at the expiration of such month have vacated and surrendered possession of said leased premises to said Lessor.

Destruction of Premises.

9. That if the said building or the said leased premises shall be destroyed by fire or other cause or be so damaged thereby that they become untenantable and cannot be rendered tenantable within ninety (90) days from the date of the injury this lease may be terminated by the Lessor; that in case said premises shall be so damaged as not to require a termination of the lease as above provided, then a proportionate allowance shall be made to the Lessee for the rent hereinbefore reserved corresponding to the time during which and to the portion of the premises of which the Lessee shall be so deprived. The Lessee expressly waives the provisions of section 1982 and subdivision 4 of section 1933 of the Civil Code of the State of California. The Lessor shall be sole judge as to whether such damage has caused said building or premises to be untenantable, and as to whether they can be rendered tenantable within ninety days from the date of the injury.

Plaintiff's Exhibit No. 6—(continued)

Entry and Inspection.

10. Said Lessor shall have the right at all times during the term of this lease to enter said leased premises for the purpose of examining or inspecting the same, and of making such repairs or alterations therein or in other parts of said building as said Lessor shall deem necessary in connection with said premises, or said building.

Service Charges.

11. Lessee agree to pay during the term hereof, all charges made against said premises for water rates, gas, electric lights, power, heat, telephone and garbage disposal services, and for any other commodities furnished or supplied or used in or upon or about said premises.

Roof.

12. The Lessor agrees to maintain the roof over said demised premises in good order and repair and repairs to said roof shall be made by and at the expense of the Lessor.

Damages.

13. Said Lessee hereby waives all claims for damages that may be caused by the Lessor in re-entering and taking possession of the said leased premises; as herein provided or for loss of injury of, by or arising out of theft, burglary, fire, steam, gas, electricity, or defect in the building, or by or out of the breaking, leakage, or overflow of the

Plaintiff's Exhibit No. 6—(continued)

roof, or of any pipe, sewer or plumbing, or by or out of the destruction or injury of the building, or any part thereof, or by or out of the making of any repairs, alterations, additions, or improvements to said building; or any part thereof, or by reason of loss of property, or injury or damage to person or property occurring in said leased premises or in or about said building no matter how caused.

Subordination.

14. This lease shall be subject and subordinate at all times to the lien of any mortgage or mortgages or trust deed or deeds which may now exist upon or which may be placed upon the demised premises or the property of which the demised premises are a part and the renter covenants that it will execute and deliver to the owner or to the nominee of the owner proper subordination agreements to this effect at any time upon the request of the owner and without payment being made therefore.

Breach of Conditions.

15. Each and every covenant and term hereof to be kept and performed by the Lessee is expressly made a condition, upon breach whereof said Lessor may terminate this lease and exercise all rights of entry and re-entry upon said leased premises, herein provided for.

Non-Waiver of Breach.

16. The failure or omission of said Lessor to

Plaintiff's Exhibit No. 6—(continued)

terminate this lease, for any violation of any of its terms, conditions or covenants shall in nowise be deemed to be a consent by the Lessor to such violation, and shall in nowise bar, estop or prevent said Lessor from terminating this lease thereafter, either for such or for any subsequent violation of any such term, condition or covenant. The acceptance of rent hereunder shall not be, or be construed to be, a waiver of any breach of any term, covenant or condition of this lease.

Costs of Suit.

17. That in each suit brought for the recovery of any rent due hereunder, or for the recovery of the possession of said demised premises, or for the breach of any of the terms, conditions or covenants of this lease, wherein said Lessor shall prevail, said Lessee shall pay said Lessor a reasonable sum as and for attorney's fees therein, the amount of which shall be determined by the court in such suit and added to and become part of the judgment therein.

Service of Notice.

18. The service of any and all notices of any nature and description given by said Lessor to said Lessee, when given to said Lessee in the manner now prescribed by the provisions of section 1162 of the Code of Civil Procedure of the State of California, or else when mailed to said Lessee addressed to said Lessee to said leased premises, shall be deemed to be and constitute full and com-

Plaintiff's Exhibit No. 6—(continued)

plete notice to said Lessee and shall constitute full compliance with any of the provisions of this lease or of the laws of the State of California requiring personal service of notice upon said Lessee and shall constitute notice to said Lessee for any purpose whatsoever.

Security.

19. It is further covenanted and agreed by said Lessee that nothing herein contained and no security or guarantee which may now or hereafter be furnished said Lessor for the payment of the rent herein reserved or for the performance by said Lessee of the other terms or covenants of this lease, shall in any way be a bar or defense to any action in unlawful detainer, or for the recovery of said premises, or in any action which said Lessor may at any time commence for breach of any of the terms or covenants of this lease.

Lessor and Lessee Defined.

20. The word "Lessor" and the word "Lessee" as used herein include the plural as well as the singular. The neuter gender where used herein, shall include the masculine and feminine.

Heirs, etc., Included.

21. This lease shall include and inure to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto, but nothing in this paragraph contained shall be con-

Plaintiff's Exhibit No. 6—(continued)

strued to modify or impair in any manner any of the provisions and restrictions of this lease relating to the assignment of this lease or of any interest therein, or to subletting or underletting of said leased premises or any part thereof.

22. The Lessee agrees that this instrument contains all of the provisions of the agreement between the parties hereto, and that no promise or agreement not contained herein shall be binding on the Lessor.

23. Time is the essence of this agreement.

24. It is further understood and agreed that either the Lessor or the Lessee may at any time during the term terminate this lease upon giving ninety (90) days written notice to the other of their or its desire to terminate the same, and this lease shall be terminated at the expiration of the month designated in such ninety (90) day written notice, or if no month is designated then at the end of the month ending immediately after the expiration of said ninety (90) day period.

25. The Lessee is hereby given permission to cut out a portion of the floor from the west rear door to the main floor so that a truck can drive into the building for the purpose of loading and unloading, and the Lessee agrees to replace said floor at the expiration or sooner termination of this lease in as good order and condition as the same is now, all of such work to be done by the Lessee at its own cost and expense.

Plaintiff's Exhibit No. 6—(continued)

26. The Lessor agrees to repair a leak in the roof of said building now existing between the main entrance and the main floor thereof.

27. It is understood and agreed that the tires may be placed on top of the bleacher seats and on the main floor of said building, and that tires placed on these seats are to be piled not to exceed six high with two laths under each pile.

In witness whereof, said parties have executed this lease the day and year first above written.

/s/ CLYDE W. HENRY,
/s/ C. PARELLA,
Lessor.

CAPITOL CHEVROLET COMPANY,
a California corporation,

/s/ JAS. A. KENYON,
Pres.
Lessee,

Cancelled due to fire.

/s/ JAS. A. KENYON.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFFS' EXHIBIT No. 8

Home Office and Plant
921 Del Paso Blvd.
Sacramento, California
Tel: 9-3045

U. S. MACHINERY COMPANY
1568 RUSS BUILDING
San Francisco, California
Tel: DOuglas 7327

CLYDE W. HENRY

Sacramento, Calif.

To Watchman at Ice Palace:

Please allow bearer, Mr. Tony Sanchez, to enter with his two men to remove pipe & equipment.

/s/ CLYDE HENRY.

[Endorsed]: Filed Feb. 13, 1945.

PLAINTIFFS' EXHIBIT No. 9

200 Bush Street
San Francisco, California

January 22, 1943

Gordon Kenyon
c/o Capital Chevrolet Company
1300 K Street
Sacramento, California

Dear Mr. Kenyon:

You are requested not to permit any one to enter the warehouse premises where tires are stored for account of this Corporation for any reason whatso-

ever, other than authorized appraisers or properly identified employees of this Corporation.

In the near future, however, you may be called upon by a representative of the Rubber Manufacturers Association of America, Inc., which organization is to handle the distribution of the tires acquired by us, and upon proper identification from such representative entrance to the warehouse and examination of any tires may be permitted. Your strict observance of the above will be appreciated.

Very truly yours,

/s/ F. J. TITGEN,

Agent.

[Endorsed]: Filed U.S.D.C. Feb. 2, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFFS' EXHIBIT No. 10

MEN ELIGIBLE TO ENTER D S C WAREHOUSE

Jas. A. Kenyon, Pes.
H. C. Gerhart, Warehouseman
A. Koleyke, Chief Tire Appraiser
Mr. Turner, Realator
Mr. Henry, Part Owner
Mr. Petrillo, Part Owner
G. A. Kenyon, Supervisor

Tire Pilers & Stackers

George Forshay	Louis Hill
Dale Borden	Edward Schubert
G. E. Allison	Dale Wilson
Melvin Parr	George Shaw
Don Cole	

[Endorsed]: Filed U.S.D.C. Feb. 13, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFFS' EXHIBIT No. 11

AGENCY AGREEMENT WITH GOVERNMENT CUSTODIAN

This Agency Agreement dated October 1st, 1942, between Lawrence Warehouse Company, a California corporation, acting as custodian for governmental agencies, and Capitol Chevrolet Company (Name and status, i.e., individual, partnership, corporation, etc.) of ....., in the County of ....., State of .....

Capitol Chevrolet Company (hereinafter called Agent) agrees with Lawrence Warehouse Company, acting as custodian for governmental agencies and hereinafter called Principal.

1. To furnish suitable storage space for the storage of such tires and tubes as may be delivered to Agent to the total of available capacity of Agent.

2. To receive such tires and tubes as may be delivered to Agent for the account of Lawrence

Warehouse Company as custodian for the Defense Supplies Corporation, or any other governmental agency.

3. To store and safeguard the storage of such tires and tubes as are received by Agent. To keep such tires and tubes separate and apart from any other merchandise whatsoever and to place upon such tires and tubes such evidence of ownership, custodianship, purchase, date of deposit and other information as may be required by the Principal.

4. To issue a receipt evidencing the deposit of such tires and tubes in such form as may be approved by the Principal, and to maintain such records as may be necessary in the opinion of the Principal.

5. To release tires and tubes in possession of Agent only upon instructions from the Principal.

6. To place such distinguishing signs as may be delivered to Agent within the area in which the tires and tubes are stored to indicate possession by the Principal of the tires and tubes as custodian for the governmental agency or agencies and to indicate ownership by the Government of the United States.

7. To agree that he will at his own cost and expense keep said demised premises in good order and repair, and that the Principal shall not be called upon or required to make any repairs of any kind or nature to, in or about said demised premises. Further, should the Agent wish to be relieved

of further participation, it is agreed that he will bear all expenses for the removal and storage of the tires and tubes at a place designated by the Principal.

8. To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth.

9. The Principal agrees to compensate the Agent for the storage and handling of tires and tubes in the manner above provided at the following rates:

(a) Handling in and out: 3c per tire and 1c per tube.

(b) Storage: 1½c per month per tire and ½c per month per tube.

No other compensation of any kind will be paid by Principal to Agent.

The sums above set forth shall be paid by the Principal to the Agent within ten (10) days after receipt by the Principal from the governmental agency or agencies of sums hereinabove set forth.

10. No Member of or Delegate to the Congress of the United States of America, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract so far as it is made with a corporation for its general benefit.

11. In the employment of workers for the performance of this contract, the Agent shall not discriminate against any worker because of race, creed, color or national origin.

12. The Agent shall comply with the requirements of thhe Walsh-Healy Act (Act of June 30, 1946, 49 Stat. 2036: U. S. Code, Title 41, Secs. 35-45) insofar as such Act is applicable to this transaction.

It is contemplated that the Principal will issue its Warehouse Receipts to the governmental agency or agencies for whom it acts as custodian, and the Agent therefore agrees to deliver regular reports to the Principal as frequently as the Principal may require, evidencing the receipt by it of tires and tubes during that period; to deliver to the Principal copies of all receipts or other documents issued by the Agent and to permit the release of tires and tubes only upon written authority of the Principal.

It is agreed that the Principal shall have the right to examine the records kept by the Agent whenever the Principal desires to do so, and the Agent will assist the Principal in making a physi-

cal inventory of the tires and tubes whenever required.

CAPITOL CHEVROLET COMPANY,
/s/ JAS. A. KENYON, Pres.-Agent.

LAWRENCE WAREHOUSE COMPANY,
/s/ CLYDE HILDRETH, Principal.

[Endorsed]: Filed U.S.D.C. Feb. 2, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFFS' EXHIBIT No. 12

Report on Ice Palace Fire, Friday, April 9, 1943

On returning from lunch at approximately 1:30 p. m. Miss Esycheck advised me the United Press was attempting to contact me to get a report regarding the fire at the Ice Palace.

This was the first information I had relative to the Ice Palace burning. In company with Mr. Salstrand of General Motors Acceptance Corp. I got in my car and drove to the Ice Palace immediately. By the time we arrived, not later than 1:40, the Ice Palace had completely burned and was a total loss including all of the contents.

I met Mr. Campbell from the F.B.I. on the highway in front of the Ice Palace and called the

watchman over who was on duty and had him explain his story to Mr. Campbell. He advised me that at 12:30 some man, whom he did not know, came to his office where he was having lunch, and told him the southwest corner of the building was on fire. He ran out and looked at the southwest corner of the building which was burning freely. He went back to his office, called the Fire Department and called Capitol Chevrolet, notifying us that the building was on fire.

Relative to information supplied by my brother, Gordon Kenyon, he states that he arrived at the Ice Palace about a quarter to one and that then flames were coming out of the sides and the back of the building. However, flames were not coming from the front of the building. There was such a dense smoke that it was impossible to see whether the roof had caved in at that time or not.

On April 4th a man came to the Ice Palace to set up equipment to remove a well for Mr. Henry, the owner of the Ice Palace. The watchman on duty would not let him in to remove any part of the well without a card of authority to do so.

On Monday morning, April 5th, a man arrived at our office asking that we release this well equipment. Gordon Kenyon in turn called Mr. Turner of the West Sacramento Land Company, who stated that it would be all right to allow this equipment to be removed. Gordon in turn gave a card to the watchman allowing him to remove his well equipment.

On the southwest corner of the Ice Palace there is an engine room where the engines and boilers used to be to freeze the ice for skating. In this engine room there was steel plate some 9'x18' long which Mr. Henry wanted removed. It is our understanding that the freezing equipment was shipped to Nogales to freeze food supplies for the army. It was necessary for the men to have welding equipment and acetylene equipment to remove this well and steel plate and this equipment was located approximately where stated on the attached map.

On Gordon's arrival at 12:45 at the Ice Palace the welding truck which carries the equipment had been moved to some four hundred feet away from the building up to the highway.

The following information was received from Mr. Gerhart, who had direct charge of the consolidation of the tires. Mr. Gerhart was out at the Ice Palace from 8:00 to 9:30 a. m. He returned at 11:00 with a truck load of tires and left about 12:00 with all of our employees to go down town for lunch, leaving the watchman at the building. When he heard the warehouse was on fire he returned to the Ice Palace at approximately one o'clock, however, there was nothing that he could do inasmuch as the complete building was in flames.

Mr. Gerhart stated that when the welding men originally came to remove the place and well equipment that they attempted to go into the engine room through a door leading from the inside of the Ice Palace. The door was blocked with tires

and it was therefor necessary for them to go in through this engine room from an outside door on the west side of the building. Mr. Gerhart further stated that all of the windows were out of the engine room and that there was considerable oil on the floor. Consequently we did not use this space for tire storage.

I called Mr. Baxter of the Defense Supplies Corporation at approximately 2:30 and advised him that we had lost twenty-six thousand two hundred eleven (26,211) tires and he called me back about an hour later and advised me that he and Mr. McKee would come to Sacramento on the evening of April 9, 1943.

At 5:00 o'clock April 9th, the watchman came to my office and advised that a man living in a row of cottages immediately west of the Ice Palace was in his yard taking a sun bath when he saw flames shoot out of the engine room. Immediately after this there were two, three, or four explosions on the engine room.

The welding truck mentioned, carried only electrical welding equipment but there were two tanks and two welding torches on the floor of the engine room.

At 11:30 April 9th, the watchman made a circle around the warehouse cautioning the men using the torches to be careful of fire which he had also done on April 8th.

At 12:00 when our men left for Sacramento to

eat their lunch the watchman went to the back of the building and shut the door which we were using to unload tires. At this time he went into his office, sat down and ate his lunch and just as he was finished with his lunch one of the welders came in and told him the rear part of the building was on fire and asked if he had a telephone.

The watchman then called central and asked for the fire department and was asked where the fire was and given the Sacramento Fire Department and advised by them to wait until they could get in touch with the Chief. Finally the Chief came on the line and told him that the fire was outside of Sacramento city limits and not under his jurisdiction and that they had a nice little fire department in West Sacramento and suggested they call them.

After the fire today the watchman talked to the welder that was using the torch and he admitted setting fire from his torch and that he had carried several pails of water, of which he assumed about three hundred gallons, putting it on the fire by himself, attempted to put out the fire before notifying the fire department.

CAPITOL CHEVROLET COMPANY,

/s/ JAS. A. KENYON, Pres.

[Endorsed]: Filed U.S.D.C. Feb. 13, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

PLAINTIFF'S EXHIBIT No. 13

200 Bush Street
San Francisco, California

January 22, 1943

Mr. William C. Hanley
Assistant Vice President
Lawrence Warehouse Company
37 Drumm Street
San Francisco, California

Dear Mr. Hanley:

You are requested not to permit any one to enter the warehouse premises where tires are stored for the account of this Corporation for any reason whatsoever, other than authorized appraisers or properly authorized employees of this Corporation.

In the near future, however, you may be called upon by a representative of the Rubber Manufacturers Association of America, Inc., which association is to handle the distribution of the tires acquired by us, and upon proper identification from such representatives entrance to the warehouse and examination of any tires may be permitted. Your strict observance of the above will be appreciated.

Similar instructions are being mailed today to Mr. Paul Lorton, Fresno, California, Mr. Gordon Kenyon, Sacramento, Mr. Viggo Erikson, Eureka and Mr. R. E. Kraschel, Bakersfield. Please advise your Oakland representatives and any others con-

trolling all warehouse locations under your jurisdiction.

Yours very truly,

/s/ F. J. TITGEN,

Agent.

[Endorsed]. Filed U.S.D.C. Feb. 14, 1945.

[Endorsed]: Filed U.S.C.C.A. Sept. 4, 1946.

[Endorsed]: No. 11418. United States Circuit Court of Appeals for the Ninth Circuit. Lawrence Warehouse Company, a corporation, Appellant, vs. Defense Supplies Corporation, Appellee. Capitol Chevrolet Company, a corporation, Appellant, vs. Defense Supplies Corporation, Appellee. V. J. McGrew, Appellant, vs. Defense Supplies Corporation, Appellee. Defense Supplies Corporation, Appellant, vs. Clyde W. Henry, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: August 31, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
Ninth Circuit

No. 11418

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,

Appellee.

STATEMENT OF POINTS UPON WHICH LAWRENCE WAREHOUSE COMPANY INTENDS TO RELY ON ITS APPEAL AND DESIGNATION OF RECORD IT THINKS NECESSARY FOR CONSIDERATION THEREOF

I.

The evidence does not support the finding (No. III, Tr. p. 72) nor was there any evidence that defendant V. J. McGrew negligently and carelessly caused an acetylene torch to be used on the premises in which plaintiff's said goods were stored and used and operated said torch on said premises in a negligent and careless manner.

II.

The evidence does not support the finding (No. III above mentioned) nor was there any evidence that by reason of said negligence and carelessness said torch set fire to said premises and caused the

same, together with its contents including plaintiff's goods, to be consumed and totally destroyed by fire.

III.

The evidence does not support the finding (No. V, Tr. p. 73) nor was there any evidence that defendants, Lawrence Warehouse Company and Capital Chevrolet Company, failed and omitted to exercise reasonable care and diligence for the protection and preservation of the goods so deposited and stored by plaintiff.

IV.

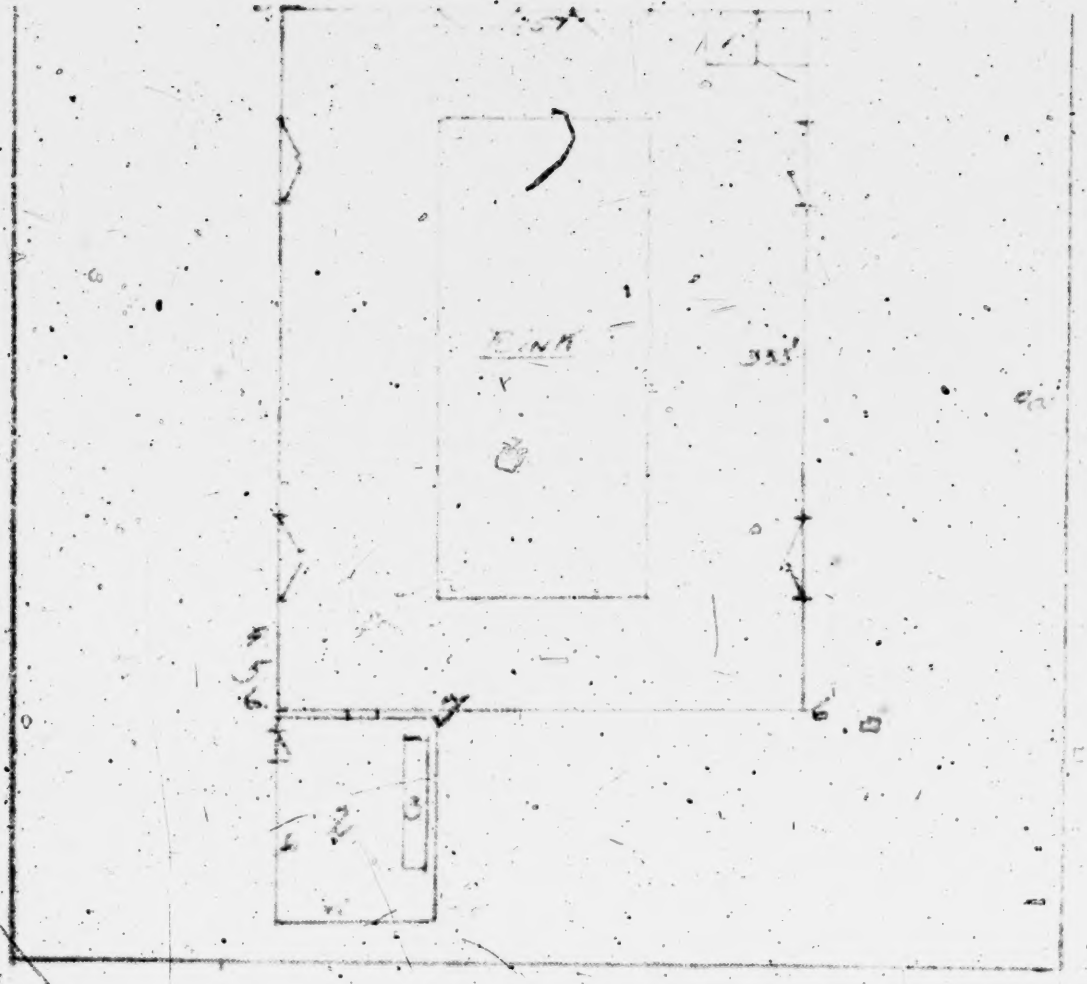
The evidence does not support the finding (No. V) nor was there any evidence that defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner.

V.

The evidence does not support the finding (No. V) nor was there any evidence that defendants, Lawrence Warehouse Company and Capital Chevrolet Company, failed to provide adequate protection for said premises and said goods against the use of said torch and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire.

VI.

The evidence does not support the finding (No. V) nor was there any evidence that by reason of such negligence and carelessness said premises and



1. Office - guard - telephone.
2. Engine Room.
3. Brine tank.
4. Well being dismantled.
5. Welding truck.
6. Fire Hydrants - 4 corners of building.
7. Fire started here.

No. 11118
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
FILED
SEP 4 - 1946
PAUL P. O'BRIEN,
CLERK

No 43174-S
Pl's Exhibit No. 7
Filed 2/13/46
C. W. Calbreath, Clerk.
By A. E. Woolard
Deputy Clerk

plaintiff's said goods were consumed and totally destroyed by fire.

VII.

The evidence does not support the finding (No. VI, Tr. p. 73) nor was there any evidence that the negligence of defendants, V. J. McGrew, Lawrence Warehouse Company and Capital Chevrolet Company, concurred and joined together to destroy plaintiff's goods.,

VIII.

The evidence does not support the finding (No. VII, Tr. p. 73) nor was there any evidence that by reason of the negligent acts of defendants, V. J. McGrew, Lawrence Warehouse Company and Capital Chevrolet Company, plaintiff was damaged in the sum of $41,975.15.

IX.

The conclusions of law (Tr. p. 74) are not supported by the findings of fact and are against law in that the trial court proceeded upon the erroneous theory that in this action, which was based upon a charge of negligence, the burden of proof was upon the defendants, appellants here, and not upon the plaintiff, appellee.

X.

Appellant deems necessary for the consideration of the above-mentioned points the Certified Record, Reporter's Transcript and certain exhibits filed with the clerk of this Court and designates for printing the entire transcript so filed, except that appellant does not desire or designate to be included in the printed record Plaintiff's Exhibits 2, 6, 7, 12 and 13.

Dated: September 16, 1946.

/s/ W. F. WILLIAMSON,
/s/ W. R. WALLACE, JR.
/s/ WILLIAM R. RAY,
WILLIAMSON & WALLACE,
Attorneys for Appellant.

Receipt of copy of the within admitted this 16 day of September.

BROBECK, PHLEGER & HARRISON,
Attorneys for Appellee.

[Endorsed]: Filed Sept. 16, 1946.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER RE ORIGINAL EXHIBITS

To the Honorable the Judges of the Above Entitled Court:

Lawrence Warehouse Company, Appellant above named, hereby applies for an Order of this Court that its Appeal in the above matter may be considered in part upon Original Exhibits filed in the trial thereof without the same being printed as a part of the printed record herein.

Plaintiff's Exhibits 4, 5 and 14 and Defendant's Exhibit B are deemed necessary in the consideration of the Points upon which Appellant Relies On

Appeal. Exhibits 4 and 5 and B are long printed or mimeographed documents relating to the Idle Tire Program and the prices properly chargeable for used tires. The same are long and contain many figures which would make them very expensive to print and would not make them more legible. Exhibit 14 is a rough sketch which will aid the Court in visualizing the building involved but which would be difficult and expensive to reproduce in the printed record.

Wherefore Appellant prays this Court make its Order that in the Preparation of the Printed Record herein plaintiff's Exhibits "4," "5" and "14" and Defendant's Exhibit "B" need not be included but may be considered a part of the record in their original form.

Dated: September 17, 1946.

Respectfully submitted,
/s/ W. F. WILLIAMSON,
/s/ W. R. WALLACE, Jr.,
/s/ WILLIAM R. RAY,
/s/ WILLIAMSON & WALLACE,
Attorneys for Appellant,
Lawrence Warehouse Company.

So Ordered:

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

[Endorsed] Filed Sept. 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

DEFENSE SUPPLIES CORPORATION,

Appellant,

vs.

CLYDE W. HENRY,

Appellee.

STATEMENT OF POINTS ON WHICH DEFENSE SUPPLIES CORPORATION INTENDS TO RELY ON ITS APPEAL FROM THAT PORTION OF THE JUDGMENT WHICH IS IN FAVOR OF DEFENDANT CLYDE W. HENRY, AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

I.

That portion of the Court's Findings of Fact included in the last two sentences of paragraph IV of said Findings (Clerk's transcript page 72) is not supported by the evidence. It appears from the evidence that (a) defendant V. J. McGrew was the agent and servant of defendant Clyde W. Henry, and was not an independent contractor, (b) Clyde W. Henry instructed and directed V. J. McGrew to perform work inherently dangerous, and (c) Clyde W. Henry owed a nondelegable duty to protect the property which was destroyed. The trial court, therefore, should have found that defendant Clyde W. Henry negligently and carelessly caused an acetylene torch to be used on the premises in which the plaintiff's goods were stored, and used

and operated said torch on said premises in a negligent and careless manner.

II.

That portion of the Court's conclusions of law included in paragraph II of said conclusions. (Clerk's transcript page 74) is contrary to law for the foregoing reasons. The trial court should have denied the motion of defendant Clyde W. Henry to dismiss the action and should have entered judgment in favor of the plaintiff against said defendant, as well as against the defendants Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew, for the sum of $41,975.15, together with plaintiff's costs of suit.

III.

Appellant Defense Supplies Corporation deems necessary for the consideration of the foregoing points, and hereby designates for printing, the entire record filed herein, including the reporter's transcript of the oral testimony taken and all exhibits admitted in evidence, with the exception of the following: (a) the answers and cross complaints of all defendants other than defendant Clyde W. Henry, and (b) the interrogatories propounded to plaintiff by defendant Lawrence Warehouse Company and the answers thereto. All of the record hereby designated to be printed has been designated to be printed by appellant Lawrence Warehouse Company and Defense Supplies Corporation as appelee by written designations heretofore filed herein, and no duplication is desired.

Dated: September 19, 1946.

/s/ THEODORE R. MEYER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Appellant, Defense Supplies Corporation.

Due service and receipt of a copy of the within is hereby admitted this 19th day of Sept. 1946.

/s/ C. S. RENNIE,
For Mr. L. Glicksberg,
Attorney for Clyde W. Henry.

[Endorsed]: Filed Sept. 20, 1946.

[Title of Circuit Court of Appeals and Cause.]

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD WHICH APPELLANT DEFENSE SUPPLIES CORPORATION THINKS MATERIAL AND NECESSARY FOR THE CONSIDERATION OF THE APPEAL OF LAWRENCE WAREHOUSE COMPANY.

In addition to the record designated to be printed by appellant Lawrence Warehouse Company by

written designation dated September 16, 1946, and heretofore filed herein, appellee Defense Supplies Corporation thinks the following exhibits are material and necessary for the consideration of the appeal of said appellant: Plaintiff's Exhibits 2, 6, 7, 12 and 13.

Said appellee, therefore, hereby designates the said exhibits for printing.

Dated: September 19, 1946.

/s/ THEODORE R. MEYER,

/s/ BROBECK, PHLEGER & HARRISON,

Attorneys for Appellee Defense Supplies Corporation.

Receipt of a copy of the within is hereby admitted this 19th day of September, 1946.

/s/ WILLIAM R. RAY,

/s/ WILLIAMSON & WALLACE,

Attorneys for Appellant Lawrence Warehouse Co.

[Endorsed]: Filed Sept. 20, 1946.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11418.

DEFENSE SUPPLIES CORPORATION,
Plaintiff and Appellee,

vs.

LAWRENCE WAREHOUSE COMPANY, et al.,
Defendants and Appellants.

DESIGNATION OF POINTS UPON WHICH APPELLANT CAPITOL CHEVROLET COMPANY INTENDS TO RELY

Appellant Capitol Chevrolet Company designates the following points upon which it intends to rely:

I.

That the plaintiff, Defense Supplies Corporation, has no power or authority to institute or maintain the instant action and is not a proper party as plaintiff.

II.

That the complaint herein and no count thereof states a cause of action against this appellant.

III.

That the evidence does not support the Findings (2) (R. Tr. 72) nor was there any evidence that the defendant D. J. McGrew negligently and carelessly caused an acetylene torch to be used on the premises in which the plaintiff's said goods were

stored and used and operated said torch on said premises in a negligent and careless manner.

IV.

That the evidence does not support the Findings (3) (R. Tr. 72) nor was there any evidence that by reason of said negligence and carelessness said torch set fire to said premises and caused the same together with its contents, including plaintiff's goods, to be consumed and totally destroyed by fire.

V.

That the evidence does not support the Findings (5) (R. Tr. 73) nor was there any evidence that the defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of the goods so deposited and stored by plaintiff.

VI.

That the evidence does not support the Findings (5) (R. Tr. 73) nor was there any evidence that defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner.

VII.

That the evidence does not support the Findings (5) (R. Tr. 73) nor was there any evidence that defendants Lawrence Warehouse and Capitol Chevrolet Company failed to provide adequate protection for said premises and said goods against the

use of said torch and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire.

VIII.

That the evidence does not support the Findings (5) (R. Tr. 73), nor was there any evidence that by reason of such neglect and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire.

IX.

The evidence does not support the Findings (6) (R. Tr. 73) nor was there any evidence that the neglect of defendants D. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods.

X.

The evidence does not support the Findings (7) (R. Tr. 73) nor was there any evidence that by reason of the negligent acts of defendants D. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company that plaintiff was damaged to the sum of $41,975.15.

XI.

That the Conclusions of Law (Tr. 74) are not supported by the Finds of Fact and are against law and that the Trial Court proceeded upon the erroneous theory that if this action was based upon a charge of negligence, the burden of proof was

upon the defendants, Appellants here, and not upon the Plaintiff, Appellee.

XII.

That the Findings of Fact do not support the judgment against Appellant but require judgment in its favor.

XIII.

That there is no substantial or competent evidence to sustain the Findings of Fact.

XIV.

That there is no substantial or competent evidence to support the Judgment and the Judgment is contrary to the law and evidence.

XV.

That the Court erred in receiving in evidence testimony and documents showing prices paid by Plaintiff for the articles destroyed and the ceiling prices thereon fixed by the Office of Price Administration.

XVI.

That the Court erred in ruling that the burden was on Appellant to establish its freedom from negligence under the California Warehouse Receipts Act.

XVII.

That the Court erred in denying Appellant's Motion to Strike the testimony of the witness McClellan as to the value of the tires involved on the ground that such testimony was speculative, irrelevant and pertains solely to tires other than those involved in this proceeding.

XVIII.

That the Trial Court erred in awarding the Plaintiff any more than a nominal sum as damages, even if it be assumed that negligence of Appellant was sufficiently established.

XIX.

That undisputed evidence clearly shows that Plaintiff was guilty of contributory negligence.

XX.

That the Court erred in overruling Appellant's objection to Plaintiff's Exhibit 12 on the ground that it is hearsay.

XXI.

That the Court erred in its rulings during the trial in the admission of incompetent evidence prejudicial to the Appellant.

Appellant deems necessary for the consideration of the above mentioned points the certified record, Reporter's Transcript, and certain exhibits filed with the clerk of this court, and designates for printing the entire transcript so filed, except that appellant does not desire or designate to be included in the printed record Plaintiff's Exhibits 2, 6, 7, 12 and 13.

/s/ MORRIS LAVINE,
Attorney for Appellant
Capitol Chevrolet Company.

[Affiffidavit of service by mail attached.]

[Endorsed]: Filed Oct. 7, 1946.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD WHICH APPELLEE DEFENSE SUPPLIES CORPORATION THINKS MATERIAL AND NECESSARY FOR THE CONSIDERATION OF THE APPEAL OF THE CAPITOL CHEVROLET COMPANY

In addition to the record designated to be printed by appellant Capitol Chevrolet Company by written designation heretofore filed herein, appellee Defense Supplies Corporation thinks the following exhibits are material and necessary for the consideration of the appeal of said appellant: Plaintiff's Exhibits 2, 6, 7, 12 and 13.

Said appellee, therefore, hereby designates the said exhibits for printing.

Dated: October 17, 1946.

/s/ THEODORE R. MEYER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Appellee Defense Supplies Corporation.

[Affiffidavit of service by mail attached.]

[Endorsed]: Filed Oct. 17, 1946.

No. 11418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE WAREHOUSE COMPANY, a Corporation,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY, a Corporation,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, October 14, 1947

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. W. R. Wallace, Jr., counsel for appellant Lawrence Warehouse Company, by Mr. Albert H. Gomm, Jr., counsel for appellant McGrew, by Mr. Morris Lavine, counsel for appellant Capitol Chevrolet Company, and by Mr. David E. Lombardi, counsel for appellee Defense Supplies, and submitted to the court for consideration and decision, with leave to Mr. Morris Lavine, to file reply brief in five days.

Excerpt from Proceedings of Friday, December 5, 1947

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,418

Dec. 5, 1947

LAWRENCE WAREHOUSE COMPANY, a Corporation, Appellant,

vs.

DEFENSE SUPPLIES CORPORATION, Appellee.

CAPITOL CHEVROLET COMPANY, a Corporation, Appellant,

vs.

DEFENSE SUPPLIES CORPORATION, Appellee.

V. J. McGREW, Appellant,

vs.

DEFENSE SUPPLIES CORPORATION, Appellee.

DEFENSE SUPPLIES CORPORATION, Appellant,

vs.

CLYDE W. HENRY, Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy, and Bone, Circuit Judges.

Healy, Circuit Judge.

OPINION

Defense Supplies Corporation, an agency of the United States, recovered a judgment in damages against Lawrence Warehouse Company, Capitol Chevrolet Company, and B. J. McGrew, for the negligent destruction by fire of a quantity of automobile tires and tubes stored in a warehouse. With the exception of McGrew, the named defendants have appealed from the judgment. The defendant Clyde W. Henry, owner of the building in which the property was stored, was exonerated from liability, and from this phase of the judgment Defense Supplies Corporation appeals. In the interest of brevity Defense Supplies will be referred to as the Corporation, the Lawrence Warehouse Company as Lawrence, and the Capitol Chevrolet Company as Capitol.

The purpose of the Corporation was to create a stockpile of used and spare automobile tires and tubes in aid of the national defense. A quantity of these commodities having early in 1943 been accumulated at Sacramento, the Corporation contracted with Lawrence for their safekeeping and storage. Lawrence had earlier entered into an agency agreement with Capitol for the storage of tires and tubes to be delivered by Lawrence as custodian for the Corporation. In pursuance of this agreement Capitol, on March 1, 1943, leased from Henry a building known as the Ice Palace,

formerly a skating rink, located outside the city of Sacramento. This was a wooden structure having connected with it an engine room, also of wood, save that the partition between it and the main body of the Ice Palace was of concrete. The Corporation approved the lease of the Ice Palace as a place of storage, and gave its approval also to the agency contract between Capitol and Lawrence. Upon the lease of the building the accumulated tires were stored there. On April 9, 1943 the structure, together with its contents, was destroyed by a fire originating in the engine room.

By the terms of the contract between the Corporation and Lawrence the responsibility of the latter for the care and protection of the tires was confined to such care as is required by laws governing warehouses in California [see Warehouse Receipts Act, §21, 3 Deering's Cal. Gen. Laws, Act 9059] and to the exercise of ordinary care on the part of the warehouseman. The agency agreement between Lawrence and Capitol obliged the latter "to store and safeguard the storage" of such tires and tubes as were received by it from Lawrence as custodian for the Corporation. In the trial court's opinion (67 Fed. Supp. 16) the question posed for determination was whether, from a preponderance of the evidence, it had been made to appear that the bailees failed to take reasonable precautions for the prevention of fire and for its extinguishment after it occurred, thereby causing or contributing to the loss. The evidence was thought to justify an affirmative answer to this inquiry. The findings

were that Lawrence and Capitol failed to exercise reasonable care for the safeguarding from fire of the goods stored with them, and that by reason of such want of care the goods were destroyed. The negligence of these parties was found to be concurrent with that of the defendant McGrew.

1. Lawrence and Capitol insist that the evidence is insufficient, as a matter of law, to support the findings. We are unable to agree. To begin with, we are obliged to accept as true the finding that the fire originated from the use by McGrew of an acetylene torch in the cutting up of a steel tank in the engine room. The sufficiency of the showing to this effect is hardly open to debate. McGrew was a driller of wells. He needed steel casing for the lining of a well which he had undertaken to drill for Henry, and he obtained Henry's permission to use the steel to be had from the tank. Four days preceding the fire McGrew went to the Ice Palace with Henry's employee who bore a card from Henry, addressed to the watchman, asking that the men be allowed to enter "to remove pipe & equipment." The guard on duty declined to give the permission in the absence of directions from Capitol. The authority requested was then obtained by McGrew from the assistant manager of Capitol who instructed the guard accordingly.

On the day previous to the fire McGrew came to the Ice Palace with his equipment, including the acetylene torch, and proceeded by means of the torch to cut up the steel tank in the engine room.

The windows of this room and the door from the outside appear to have been open at least a portion of the time while the work was in progress. Next morning the cutting task was resumed, and shortly after twelve noon the fire broke out at or near the spot where the torch was in operation. There was evidence of the presence of some dark substance on the floor at the corner of the tank. While several hydrants were outside, there was no fire fighting equipment in the engine room other than a five-gallon bucket of water McGrew had placed there. McGrew threw this water and several additional bucketsful on the fire but his efforts to halt the flames were ineffectual, and the conflagration spread rapidly to the main part of the building where the tires were stored.

When Capitol was approached by McGrew for leave "to remove pipe & equipment" it did not inquire as to the mode of procedure to be followed in the performance of the work, nor did it take any steps to ascertain what McGrew was actually doing after his entry. No precautions were taken in the way of providing fire fighting equipment with which such a fire as the torch started could have been put out. This, too, in a structure in which valuable and highly inflammable material was stored for safe-keeping.

In the face of this showing neither Lawrence nor Capitol came forward with evidence tending to establish due care on its part. Both contend that the Corporation's burden of proving negligence

was not discharged by the showing, but the local authorities indicate a contrary view. In line with general authority on the subject it is held not necessary that there be direct evidence of negligence as a fact; proof of circumstances from which it may rationally be inferred is enough. Wilson vs. Southern Pacific R. R. Co., 62 Cal. 164, 172. And when such circumstances have been disclosed it devolves upon the warehouseman to show, as a matter of defense, what would constitute ordinary care on his part in the operation and management of his warehouse. Runkle vs. Southern Pacific Milling Co., 184 Cal. 714[1].

Now if Capitol was negligent in safeguarding the goods it follows as a matter of course that its dereliction is imputable to its principal, Lawrence. The latter argues that Capitol's negligence, if any, was not shown to be within the scope of its authority as an agent, and that there was no finding that it was. While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negli-

[1] Cf. for other cases bearing on the point, Lake Union Dry Dock & Machine Works v. United States, 9 Cir., 79 F. 2d 802, Wilson v. Crown Transfer and Storage Co., 201 Cal. 701, Atwood v. So. Cal. Ice Co., 63 Cal. App. 343, Travellers Fire Ins. Co. v. Brock and Co., 30 Cal. App. (2d) 412, U. Drive & Tour v. System Auto Parks, 28 Cal. App. (2d) (Supp.) 782, England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 8 C.J.S. 348-9.

gence. The facts of the case and the terms of the agency agreement fully support that conclusion.[2]

Capitol or Lawrence, in certain instances both, attempt to disclaim responsibility on the basis of circumstances said to be peculiar to this case. We turn now to these special circumstances. One of them relates to the fact that the Corporation approved the selection of the Ice Palace as a place of storage. We may assume that the approval would relieve the warehousemen had some known defect in the premises been the cause of the loss. But such is not thought to be the situation here. The loss resulted from the use of the acetylene torch; and the record is devoid of intimation that the Corporation approved its use, or had knowledge of the failure of the warehousemen to take reasonable pre-

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[2]There is some argument in Capitol's brief to the effect that, as an agent, it is not liable to a third party for a violation of its duty to its principal. We think that since Capitol undertook to store and safeguard the storage of the tires it is not in position to disclaim liability on the ground that it acted only as an agent. The general rule is (and no California authorities holding the contrary are cited) that if an agent, acting in the course of his principal's business, negligently causes immediate injury to the property of a third person, whether or not he be one to whom the principal owes a special duty, under circumstances which would impose liability on the agent if he were acting under the same conditions on his own account, he will be personally liable. 1 Mechem on Agency (2d) § 1430; 2 Id. § 128, 130, 224; 2 Restatement of the Law of Agency § 354; E. N. Emery Co. v. American Refrigerator Transit Co., 189 N. W. 824, (Ia.); Giles v. Moundridge Milling Co., 173 S. W. (2d) 745 (Mo.).

cautious to safeguard the property from hazards that might reasonably be expected to flow from the use of such an instrumentality.

Another circumstance relates to the status of Kissell, the guard on duty while McGrew was at work. This man was an employee of the Burns Detective Agency. In the course of the trial it was stipulated that the Corporation requested the establishment of a twenty-four hour guard service; that in compliance with the request Lawrence, with the Corporation's assent, employed the Burns Detective Agency, and paid them; and that the Corporation reimbursed Lawrence. On the strength of this arrangement Capitol appears to argue that the premises were not in its custody but were in the joint custodianship of Lawrence and the Corporation. It attempts to saddle the responsibility elsewhere on the further ground that Kissell, who was not its employee, saw McGrew working with the torch and did nothing about it. There are several answers to this line of argument. To begin with, the disclaimer of custodianship is at loggerheads with Capitol's conduct and with the terms of its written contract with Lawrence. Again, the stipulated facts are insufficient to support an inference that the Burns Agency or the guard was an employee of the Corporation. Moreover, it was Capitol, not the guard, who permitted McGrew to enter and pursue his work in the building. Kissell's presence did not preclude vigilance on Capitol's part or, indeed, render its exercise any the less imperative since Kissell acted in the matter under Capitol's directions and

had no apparent reason to suppose that McGrew's use of the torch was unauthorized.

A third circumstance has to do with a provision of the lease between Capitol and Henry to the effect that "Lessor shall have the right at all times during the terms of this lease to enter said leased premises for the purpose of examining or inspecting the same, and of making such repairs or alterations therein or in other parts of said building as said Lessor shall deem necessary in connection with said premises, or said building.". This provision, it is claimed, gave Henry or his representatives the right to make "alterations" of the kind McGrew was making; and since the Corporation approved the lease it is in no position to complain of what was done. We think, however, that the cutting up of a boiler for the purpose of fabricating well casing was not such an alteration of the building as the lease contemplated. Even if it were thought to be so, the fact did not relieve Capitol of its duty to take reasonable precautions in respect of the means by which the work was performed. Keeping in mind the structure of the Ice Palace and the inflammable nature of the goods stored there, the use of an acetylene torch on the premises was hardly indicated as a safe method of effecting the alterations. Certainly, if its employment were permitted, reasonable precautions against the hazard of its use were in order. The rule is that precautions are to be taken in proportion to the imminence of probability of harm. Wilson v. Southern Pacific R. R. Co., supra.

The Corporation furnished to Lawrence and Capitol a list of named persons whom if authorized to be admitted to the premises. Though some point is sought to be made of this circumstance, we fail to see significance in it. Capitol and its employees were not excluded, and there is no evidence that the actual custodianship of either bailee was in any way interfered with.

2. Capitol asserts error in the admission or exclusion of evidence relative to the number and value of the tires and tubes destroyed, and claims there was no competent evidence to support the findings in this respect. The proof on the subject was supplied by the testimony of one McClellan, a representative of the Corporation, and by data contained in certain exhibits, one of which was a detailed report by Capitol of the number of tires and tubes lost in the fire.

McClellan's testimony is said to be hearsay, but the record fails to show that any objection to it was interposed on that ground. Concerning quantities the evidence appears to be ample. As to the worth of the property, the opinion of the trial court discloses the method followed in arriving at values. The lowest OPA prices were taken as a guide, and we think no injustice was done the warehouseman by this course. Much is attempted to be made of the limitation upon the free sale of tires and tubes existing at the time, it being argued that the sales by the original owners were compelled by the government at a price fixed by it, hence evidence of the prices paid was inadmissible. The limitation,

however, operated to the obvious advantage of the defendants since in a free market the sales value of the goods would doubtless have been much greater.

Such uncertainties as existed were a consequence of the destruction of the property through the warehouseman's fault. Uncertainties of this nature are not a barrier to the assessment of damages. The proof was as good as any available. In the circumstances, as the trial judge observed, the most reasonable basis within the boundaries of possibility should be formulated. Pac. Steam Whaling Co. v. Alaska Packers Association, 138 Cal. 632; Hanlon D. & S. Co. v. Southern Pac. Co., 92 Cal. App. 230, 235; Story Parchment Co. v. Paterson, 282 U. S. 555; Eastman Kodak Co. v. So. Photo Materials Co., 273 U. S. 359; Rilovich v. Raymond, 20 Cal. App. (2d) 630. In this phase of the trial there was no reversible error.

3. On its appeal the corporation complains of the finding exonerating Henry from liability. The court found that McGrew's relationship with Henry was that of an independent contractor, and there is evidence to support that view of the relationship. The proof bearing upon Henry's knowledge of what McGrew was doing or proposed to do at the Ice Palace is in an unsatisfactory condition or is, at best, in conflict. We are unable to find error in the refusal to hold this defendant.

Affirmed.

[Endorsed]: Opinion. Filed Dec. 5, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday,
January 2, 1948

Before: Denman, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of Lawrence Warehouse Company, filed December 31, 1947, and petition of Capitol Chevrolet Company, filed January 2, 1948, and within time allowed therefore by rule of court, for a rehearing of above cause be, and each of said petitions hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

PETITION OF APPELLANTS LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY FOR LEAVE TO FILE MOTION TO VACATE DECISION AND FOR RECONSIDERATION

To The Honorable United States Circuit Court of Appeals for the Ninth Circuit:

The appellants Lawrence Warehouse Company and Capitol Chevrolet Company respectfully pray leave of this Court to file herein their motion to vacate its decision made and entered on December 5, 1947, and for reconsideration of the within cause.

The mandate of this Court, having been stayed until March 1, 1948; this case is within the jurisdiction of this Court, and this Court retains the right to vacate, modify or amend its judgment, where, as in this case, the judgment of the Court below and of this Court was entered under a mistake as to the facts of the case.

The grounds upon which said motion will be made are: That the trial Court and this Court each proceeded upon a mistake as to the facts of the case in that the trial Court and this Court proceeded upon the erroneous belief that, at the time of the entry of the judgment of the trial Court and during the course of appellate proceedings in this Court, the Defense Supplies Corporation, plaintiff below and appellee in this Court, was an existing corporation whereas in point of fact prior to the entry of judgment by the United States District Court for the Northern District of California, Southern Division, Appellee, a federal corporation, had been dissolved by Act of Congress; that said dissolution became effective on the 1st day of July, 1945; that the judgment of the United States District Court in the above entitled matter was entered on April 15, 1946; that at no time prior to the entry of judgment in the trial Court, or thereafter during the course of appeal to this Court, was the trial Court or this Court or counsel for appellants ever advised by appellee of its dissolution, nor was any motion ever filed in the trial Court or in this Court requesting substitution of any other proper party for appellee; that the time within which such

substitution might have been made under the terms of the Act of Congress dissolving appellee expired on June 30, 1946; that at no time after July 1, 1945 was there an existing party plaintiff before the trial Court, nor was there at any time an existing appellee in the appellate proceedings before this Court; that there being no appellee capable of carrying on in this Court or in the Court below, the action must necessarily be dismissed.

Wherefore, appellants Lawrence Warehouse Company and Capitol Chevrolet Company respectfully pray that this Court grant leave to appellants to file herein their motion to vacate its decision and for reconsideration of the decision of this Court made and entered on December 5, 1947.

Respectfully submitted,

W. R. WALLACE, JR.,
W. R. RAY,
WILLIAMSON & WALLACE,
Attorneys for Appellant
Lawrence Warehouse Company.

MORRIS LAVINE,
Attorney for Appellant
Capitol Chevrolet Company.

[Endorsed]: Filed Feb. 17, 1948.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION OF APPELLANTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY, TO VACATE DECISION AND FOR RECONSIDERATION

To: Defense Supplies Corporation, Appellee, and Theodore R. Meyer and Brobeck, Phleger & Harrison, its attorneys; V. J. McGrew, Appellant, and Albert H. Gommo, Jr., his attorney; Clyde W. Henry, Appellee, and Louis J. Glicksberg, his attorney.

You and each of you will please take notice, and notice is hereby given, that appellants, Lawrence Warehouse Company and Capitol Chevrolet Company, will on the 24th day of February, 1948, at the hour of 10:00 o'clock a.m. of said day appear before the Honorable United States Circuit Court of Appeals for the Ninth Circuit at the Courtroom thereof on the third floor of the Post Office Building, 7th and Mission Streets, San Francisco, California, and then and there move the said Court to vacate its decision herein made and entered on December 5, 1947, to reconsider the within cause, and upon such reconsideration for an order remanding the above entitled matter to the District Court of the United States for the Northern District of California, Southern Division, with instructions to said District Court to dismiss the within action.

Said motion will be made upon the grounds stated in the written motion filed by said appellants, Lawrence Warehouse Company and Capitol Chevrolet Company, in the above entitled cause, a copy of which said motion is attached hereto, and for the reasons and upon the authorities contained in the Points and Authorities filed in support of said motion, a copy of which said Points and Authorities is attached hereto.

Dated at San Francisco, California, this 17th day of February, 1948.

W. R. WALLACE, JR.,
W. R. RAY,
WILLIAMSON & WALLACE,
Attorneys for Appellant
Lawrence Warehouse Company.

MORRIS LAVINE,
Attorney for Appellant
Capitol Chevrolet Company.

[Endorsed]: Received Feb. 17, 1948.

[Title of Circuit Court of Appeals and Cause.]

MOTION OF APPELLANTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY, TO VACATE DECISION AND FOR RECONSIDERATION

To The Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Lawrence Warehouse Company and Capitol Chevrolet Company, appellants herein, respectfully pray that this Court vacate its decision herein, made and entered on December 5, 1947, affirming the judgment of the District Court of the United States for the Northern District of California, Southern Division, and that it reconsider the case and upon such reconsideration this Court duly and regularly make and enter its order remanding the above entitled matter to the District Court of the United States for the Northern District of California, Southern Division, with instructions to said District Court to dismiss the within action. This motion is made on the following grounds, to wit:

1. That the trial Court, at the time of the entry of its judgment, and this Court, during all of the proceedings upon appeal, acted under a mistake as to the facts of the case in that said trial Court and this Court and these appellants at all times from and after July 1, 1945, proceeded upon the erroneous assumption of fact that Defense Supplies Corporation, plaintiff below and appellee in this Court, was during said period an existing corporation,

whereas in fact said Defense Supplies Corporation was dissolved by Act of Congress on July 1, 1945, and has not been since said time, and is not now, an existing corporation; that at no time after July 1, 1945, was there before the trial Court or this Court any corporation as plaintiff or appellee then in existence with any corporate power.

2. That the dissolution of the Defense Supplies Corporation on July 1, 1945, terminated the relationship between said corporation and its attorneys, and, thereafter, said counsel were without power or authority to proceed in any manner in the case, except only the right to appear and advise the Court of the dissolution of their corporate client; that neither the trial Court nor this Court nor these appellants were at any time advised of such dissolution.

3. That appellee (plaintiff below) was, at the time of the commencement of this action, a federal corporation created by and organized under an act of Congress of the United States (Act of January 22, 1932, Chapter VIII, 47 Stats. at L., page 5, Title 15 U.S.C.A., Para. 601-607 incl., as amended and supplemented by the act of June 25, 1940 (54 Stat. 572)).

4. That appellee was dissolved on July 1, 1945, pursuant to the Act of June 30, 1945, Chapter 215, Public Law 109, 59 Stat. 310; that said act of Congress dissolving appellee provided that actions commenced by or against appellee could be continued by or against the Reconstruction Finance Corporation, provided that on motion or supplemental peti-

tion filed within twelve months after the date of said statute, showing a necessity for the survival of such action, the Court allowed such substitution.

5. That no motion or supplemental petition was filed within the twelve months' period provided in said act of Congress dissolving appellee; that there has been no order in the within cause allowing the same to be maintained by the Reconstruction Finance Corporation; that said Reconstruction Finance Corporation is not now and never has been a party to this action.

6. That by reason of said failure to move for the substitution of the Reconstruction Finance Corporation within the time limited, there was no existing plaintiff before the trial Court at the time of the entry of its judgment, and at no time during the course of the appellate proceedings in this Court has there been an existing appellee capable of appearance before this Court. That the plaintiff and appellee was dissolved by Act of Congress on July 1, 1945 and Reconstruction Finance Corporation was granted the right to continue said action and to move that it be substituted as a party in the place and stead of said Defense Supplies Corporation if said Reconstruction Finance Corporation filed its motion and made the showing required by said Act of Congress prior to June 30, 1946; that the Reconstruction Finance Corporation having taken no action in the premises within the period prescribed by the Act of Congress, the action terminated on July 1, 1945.

Wherefore, appellants, Lawrence Warehouse Company and Capitol Chevrolet Company, respectfully pray that this Court vacate its decision herein, made and entered on December 5, 1947, affirming the judgment of the District Court of the United States for the Northern District of California, Southern Division, and reconsider the within case, and that upon such reconsideration this Court duly and regularly make and enter its order remanding the above entitled matter to the District Court of the United States for the Northern District of California, Southern Division, with instructions to said District Court to dismiss the within action.

Respectfully submitted,

W. R. WALLACE, JR.,
W. R. RAY,
WILLIAMSON & WALLACE,
Attorneys for Appellant
Lawrence Warehouse Company.

MORRIS LAVINE,
Attorney for Appellant
Capitol Chevrolet Company.

[Endorsed]: Received Feb. 17, 1948.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday,
February 24, 1948

Before: Denman, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTION FOR LEAVE TO FILE MOTION TO VACATE DECISION AND FOR RECONSIDERATION

Ordered motion of appellants Lawrence Warehouse Company and Capitol Chevrolet Company, for leave to file motion to vacate decision and for reconsideration presented by Mr. W. B. Wallace, counsel for appellant and movant Lawrence Warehouse Company, and submitted on behalf of Capitol Chevrolet Company on papers filed by Mr. Morris Lavine, its counsel, and argued by Mr. R. L. Miller, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel for respective parties to file further briefs 5 x 5.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION TO AMEND PLEADINGS AND JUDGMENT

Submitted to Circuit Judges Denman, Healy, Bone.

To: Appellant Lawrence Warehouse Company and Messrs. Williamson and Wallace, its attorneys; Appellant Capitol Chevrolet Company and Morris Lavine, Esq., its attorney; Appellant V. J. McGrew and Albert H. Gomma, Jr., his attorney; and Appellee Clyde W. Henry and Louis J. Glicksberg, his attorney.

You and each of you will please take notice that Appellee Defense Supplies Corporation and its successor in interest, Reconstruction Finance Corporation, will on the 8th day of March, 1948 at the hour of 10 o'clock a.m. of said day, in the courtroom of the United States Circuit Court of Appeals for the Ninth Circuit, Post Office Building, Seventh and Mission Streets, San Francisco, California, move the said court for an order amending the pleadings and judgment herein by substituting Reconstruction Finance Corporation as party plaintiff and appellee in the place of Defense Supplies Corporation.

Said motion will be made on the grounds stated in the written motion served and filed herewith and for the reasons and upon the authorities set forth

in the memorandum of points and authorities served and filed herewith, dated March 1, 1948.

/s/ THEODORE R. MEYER
BROBECK, PHLEGER & HARRISON,
Attorneys for Appellee Defense Supplies Corporation and Reconstruction Finance Corporation.

[Endorsed]: Filed March 2, 1948.

[Title of Circuit Court of Appeals and Cause.]

MOTION TO AMEND PLEADINGS AND JUDGMENT

To: The Honorable United States Circuit Court of Appeals for the Ninth Circuit.

Appellee Defense Supplies Corporation and Reconstruction Finance Corporation hereby move this court for an order amending each and all of the pleadings herein and the judgment heretofore rendered by the United States District Court for the Northern District of California, Southern Division, on April 15, 1946, by substituting Reconstruction Finance Corporation, a corporation, as party plaintiff and appellee herein, in place of Defense Supplies Corporation. This motion is made on the following grounds.

That the complaint was filed herein on February 16, 1944, the action was tried on February 13, 14 and 15, 1945, and judgment was rendered by said United States District Court on April 15, 1946;

That pursuant to the provisions of the Joint Resolution of Congress of June 30, 1945 (59 Stat. 310) Appellee Defense Supplies Corporation was dissolved on July 1, 1945 and all the property, powers and functions of said Appellee were transferred to Reconstruction Finance Corporation, a corporation organized and existing pursuant to the laws of the United States;

That the pleadings herein and the judgment rendered by said District Court contained a defect in form, namely, that the plaintiff is named therein as Defense Supplies Corporation instead of Reconstruction Finance Corporation;

And that this Court should correct such defect of form by substituting Reconstruction Finance Corporation as party plaintiff in said pleadings and judgment in the place of Defense Supplies Corporation.

This motion is based upon the record herein and the memorandum of points and authorities served and filed herewith.

Respectfully submitted,

/s/ THEODORE R. MEYER
BROBECK, PHLEGER & HARRISON,
Attorneys for Appellee Defense Supplies Corporation and Reconstruction Finance Corporation.

[Endorsed]: Filed March 2, 1948.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday,
March 8, 1948

Before: Denman, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTION OF DEFENSE SUPPLIES CORPORATION AND R. F. C. TO AMEND PLEADINGS AND JUDGMENT

Ordered motion of Defense Supplies Corporation and Reconstruction Finance Corporation to amend pleadings and judgment presented by Mr. David Lombardi, counsel for said movants and by Messrs. William Wallace and Morris Lavine, counsel for appellants, Lawrence Warehouse Company and Capitol Chevrolet Company, in opposition thereto, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday,
April 6, 1948

Before: Denman, Healy and Bone,
Circuit Judges.

ORDER DIRECTING FILING OF OPINIONS ON MOTIONS AND VACATING JUDGMENT, ETC.

Ordered that the opinion and dissenting opinion of Healy, Circuit Judge, this day rendered by this Court on motion of Reconstruction Finance Corporation that it be substituted as a party herein in the place and stead of Defense Supplies Corporation, and motion of Lawrence Warehouse Company and Capitol Chevrolet Company that the judgment of this court of December 5, 1947 be vacated, etc., be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,418

April 6, 1948
(As amended by order of May 13, 1948)

LAWRENCE WAREHOUSE CORPORATION,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

Motion of Reconstruction Finance Corporation to be substituted for the Defense Supplies Corporation.

Motion of Lawrence Warehouse Company, et al., to set aside affirmance of District Court Judgment and for dismissal of the action.

Before: Denman, Healy and Bone,
Circuit Judges.

Denman, Circuit Judge.

OPINION AND DISSENTING OPINION

Motion of Reconstruction Finance Corporation

The Reconstruction Finance Corporation, purportedly joined by the Defense Supplies Corporation, moves to amend the complaint and judgment herein by substituting the Reconstruction Finance Corporation as plaintiff and judgment creditor and to substitute it as appellee in this Court.

The admitted facts are that Defense Supplies Corporation ceased to exist on July 1, 1945, by virtue of the Act of Congress of June 30, 1945, dissolving that corporation; that after it ceased to exist, the trial of the case in the District Court on which the subsequent judgment rests was continued by the filing on July 2, 1945, of a closing brief in the name of the defunct corporation; followed by the Court's order of submission of the trial on July 16, 1945; thereafter, on April 15, 1946, the judgment was entered for the non-existent corporation against certain defendants, and against it as to one defendant; that thereafter the defunct corporation purported to appeal, and the judgment

debtors appealed to this Court; thereafter, on September 16, 1946, over a year after its dissolution, the defunct corporation filed here its points and authorities on its purported appeal and briefed and argued it, and the judgment debtors did likewise; that thereafter, this Court affirmed the judgment in favor of the defunct corporation in its entirety and denied petitions for rehearing thereon.

It also is apparent that all of the judges participating in the adjudications and all the parties (except the attorneys for the defunct corporation) were ignorant of the fact that they were charged with notice of the Congressional enactment of its dissolution. As for the attorneys for the defunct corporation, they frankly admit they were aware that they purported to act for the defunct corporation.

The act dissolving the Defense Supplies Corporation, June 30, 1945, Chap. 215 Public Law 109, 59 Stats. 310, provides that, "Notwithstanding any other provision of law, all functions [of the dissolved corporation] * * * are hereby transferred * * * to Reconstruction Finance Corporation and shall be performed, exercised and administered by that corporation * * *."

That is to say that after July 1, 1945, the Reconstruction Finance Corporation "shall" file the final brief in the existing trial due after July 1, 1945, "shall" take the appeal from any adverse decision and "shall" defend in this Court any judgment favorable to it. The word "shall" is "the language

of command" used in the statute in contrast to the "may" of the judges' power to allow intervention. Anderson v. Yungkau, 329 U.S. 482, 485.

The construction of the Reconstruction Finance Corporation is, in effect, that this "shall" is not mandatory and that it need not do these things; that it may choose an alternative, namely, that lawyers formerly representing the defunct corporation may pretend it is still existing and in its name continue the trial by filing a brief and procure a judgment in favor of a non-existent party.

The dissolving act further provides that: "No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation."

The Reconstruction Finance Corporation contends that it is not bound by this provision for maintaining the action and presents no petition to the Court with the required showing. Rather, they contend they are entitled to treat the recent specific Congressional act as subordinate to 28 U.S.C. 777, providing that any court, including the Appellate Court, shall not abate any proceeding or reverse any judgment for a "defect of form." The statute concludes the Court "may at any time permit the

parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

This the Reconstruction Finance Corporation's brief would interpret as permitting us to disregard "defects of form and procedure." So interpreted, we could disregard a "defect of procedure" on appeal consisting of filing a notice of appeal four months after the judgment was entered in the District Court.

The Reconstruction Finance Corporation also contends that its failure to follow the mandate of the statute that it "shall" exercise the functions of the non-existent dissolved corporation is a mere "defect of form." That is to say, the failure to supply any litigant at all over which the Court has jurisdiction to render a judgment is not a jurisdictional defect, but a mere defect of form. As seen infra, the Supreme Court in Payne vs. Industrial Board, 258 U.S. 613, holds the defect to be "a want of jurisdiction."

The Reconstruction Finance Corporation cites our decision in Reardon vs. Balaklala Copper Co., 193 Fed. 189 (C.C.A. 9), a case brought in the California District Court on diversity of citizenship. There the Court held valid a suit commenced by the father of the deceased, under a California statute allowing a suit by the personal representative of a deceased employee. No question of substitution of the personal representative was discussed and it was assumed that the father under the California law had the right to bring the action.

We do not agree that the failure of Reconstruction Finance Corporation to appear and give a jurisdiction in personam for a judgment and thereafter perform the functions of its statutory mandate is a mere "defect of form" within Sec. 777 and deny the motion to substitute the Reconstruction Finance Corporation as judgment creditor, or as a party to the appeal.

The Motion of the Lawrence Warehouse Company et al.

The appellants from the judgment, Lawrence Warehouse Company et al., contend that the Reconstruction Finance Corporation cannot now be substituted as a party to the action as at any period of its pendency and move the court to set aside its affirmation of the judgment and remand the case to the District Court with instructions to dismiss.

Appellants' contention is not only that the judgment and its affirmance are acts in vacuo because in favor of a non-existent party but also the functions which the Reconstruction Finance Corporation shall perform are limited in time to the twelve months' period within which it must file a motion, "showing a necessity for the survival of such suit, action or other proceeding to obtain a determination of the questions involved," in which event the court "may allow the same to be maintained by or against the Reconstruction Finance Corporation."

It is apparent that if now, two years and seven months after the dissolution of the Defense Supplies Corporation, the Reconstruction Finance Cor-

poration, shall perform the former's function, the twelve month period of the statute is made meaningless, in violation of the cardinal rule of a construction of a statute that its words shall be given effect and not made nugatory. It seems impossible that Congress meant to say, "You can intervene and make the showing we require any time you please, but it would be nicer if you would do it within twelve months."

Emphasis is placed on the fact that a government agency may lose its valuable right of action if the dissolving act is construed adversely to it. As shown, infra, it is not true that by dismissal of the action here the right of action is lost to the government. The right of action here survives, though, as shown, the Supreme Court holds that the action against the dissolved corporation is "abated." Fix v. Philadelphia Barge Co., infra.

The act is not a one-way street. If the suit were against the governmental agency by a private litigant who had obtained judgment, we well could expect the argument that the statute was one for the protection of that agency and that Congress intended so to protect it, as shown, infra, by the Supreme Court decision holding non-compliance by the private suitor abated the action and caused the court to lose its jurisdiction over it.

Stress is laid on the statute's provision that no "action * * * by or against [the dissolved corporation] shall abate by reason of" its enactment. However, the Supreme Court has held of a statute identical in its provisions concerning abatement and

substitution and providing that no action against a federal officer "shall abate by reason of his death or expiration of his term of office," etc., that it is abated if his successor does not seek substitution within the twelve months' limitation provided for such procedure. The identity of the provisions of the Act of Congress of February 9, 1889, with the instant dissolving act appears in the words of the two statutes. The 1945 act provides first that "Notwithstanding any other provision of law, all functions, powers, duties and authority of the corporations hereinafter designated, are hereby transferred, * * * to Reconstruction Finance Corporation and shall be performed, * * * by that corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation and the designated corporations are hereby dissolved: * * * Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution." (Emphasis supplied.)

Then follow the parallel provision, the underscored portions showing the identity:

> "No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the sur-

yival of such suit, * * * to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation."

"That no suit, action or other proceeding lawfully commenced by or against * * * officer of the United States * * *, shall abate by reason of his death, or expiration of his term of office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for payment of costs."

In the instant act, the words "Reconstruction Finance Corporation" are substituted for the words "his successor in office." It is thus seen that Congress copied the words of its prior statute. The specific provisions of the 1945 act control those of the prior F.R.C.P. 25 (c).

The questions whether an application for substitution to maintain the action could be made after the twelve months' period came before the Supreme Court on this identical statute in the case of LeCrone vs. McAdoo, 253 U.S. 217. There, as here, the action seeking a mandamus against the Secretary of the Treasury had been decided by the District Court, its decision affirmed by the Court

of Appeals, and was before the Supreme Court on a writ of error. That court dismissed the writ of error, holding at page 219, "But we cannot consider that question or the other arguments upon the merits of the case, because Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, c. 121, 30 Stat. 822."

While holding, though not expressly, that the failure of the successor litigant to appear created an absence of jurisdiction to proceed with the action, the court, relying on LeCrone v. McAdoo, expressly so held in the succeeding decision on the same statute of 1899, John Barton Payne v. Industrial Board of Illinois, 258 U.S. 613. There Payne was litigating in performance of his federal function as a United States officer, director of railways. He had resigned more than twelve months before the dismissal was sought. The court in its per curiam stated that the writ of error is "dismissed for want of jurisdiction. Act of February 8, 1899, c. 121, 30 Stat. 822; LeCrone v. McAdoo, 253 U.S. 217, 219." (Emphasis supplied.)

It is thus apparent that the provision that the cause of action shall not abate means that the action is still pending but that the court lacks "jurisdiction" to consider it in the absence of a substitution in the period of twelve months.

Here is not a mere statute of limitation. Here is a statute which provides that after the twelve

months' period the court loses jurisdiction to consider it. It is elementary that absence of such jurisdiction cannot be waived or jurisdiction conferred by consent. Mitchell v. Mourer, 293 U.S. 237; 244; City of Gainsville v. Brown Crummer Co., 277 U.S. 54, 59; Ross v. White, 32 F. 2d 750 (CCA 8), (filing briefs does not create jurisdiction).

In 1925, Congress amended the Act of 1899 reducing the period of substitution to six months, 28 U.S.C. 780. It provided that, "where, during the pendency of action * * * [against an officer] relating to the present or future discharge of his official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." (Emphasis supplied.)

The words that "it shall be competent for the court * * * to permit the cause to be continued and maintained" obviously are the equivalent of the words of the statute of 1899 that the action shall not "abate." In the following cases the Supreme Court and Courts of Appeal have dismissed where the substitution of the official litigant is not made in the six months.

In the United States ex rel. Claussen v. Curran, Commissioner, 276 U.S. 590; 72 L.Ed. 720, the Supreme Court stated:

"January 9, 1928. Per Curiam. In this case the order of the district court dismissing the writ of habeas corpus was entered on February 1, 1926; an appeal was allowed on February 9, 1926; to the circuit court of appeals for the second circuit, which court, on December 14, 1926, entered a judgment affirming that of the district court. A writ of Certiorari was granted by this court on March 7, 1927.

"It appearing that Henry H. Curran, sued herein as Commissioner of Immigration resigned such office on March 31, 1926, and was succeeded by Benjamin M. Day, who now holds that office and that no motion was made under section 11 of the Act of February 13, 1926 (chap. 229, 43 Stat. at L. 936, 741 U.S.C. title 8, section 780), asking the court to 'permit the cause to be continued and maintained by or against the successor in office of such officer,' and that the six-months period, within which such a motion could have been made, has expired, the court now vacates the judgments entered in the district court and in the circuit court of appeals and remands the cause to the district court, with a direction to dismiss the cause as abated." (Emphasis supplied).

It is thus seen that under Sec. 780, as under the Act of 1899, the action is not abated by the absence of the federal litigant, but that it does abate at the end of the limitation period because of the failure of the successor federal litigant to be sub-

stituted in the action. That is to say, while the mere dissolution does not abate the action, it is abated after the period fixed for the appearance of the successor litigant.

It is pertinent here that in United States vs. Curran, where both litigants were federal, the resignation took place after judgment in the trial court and during the course of appeal; that the six months' time for substitution expired on September 30, 1926, before the Court of Appeals on December 24, 1926, affirmed; and that the question of the failure to substitute was first suggested to the Supreme Court after the Writ of Certiorari was granted.

Here is answered the contention of Reconstruction Finance Corporation that the delay of the appellants to move to raise the jurisdictional question has created jurisdiction by waiver. There the successor in office moving for dismissal was charged with knowledge of the resignation of its predecessor, just as here the moving parties had knowledge of the statute of June 30, 1945. There, just as it is claimed under our present rules of civil procedure, either party could have moved in the Circuit Court of Appeals for a substitution of the officer litigant, so here either could have moved for such a substitution in the District Court or in this Court.

There, as here, the opposing party could not move for a dismissal till the case reached the court of appeal, because the period of limitation expired after the appeal was taken. There, as here, the motion to dismiss could have been made before the

decision of the court of appeal or after, but was delayed till in the Supreme Court.*

The Court of Appeals of the District of Columbia, in dismissing under § 780, relies on the decisions in the LeCrone and Curran cases decided under the Act of 1899. Black Clawson Co. v. Robertson, et al., 71 F. 2d 536. Likewise, following these earlier Supreme Court decisions, are the district court decisions in Martin v. Coe, 38 F. 2d 606; Kuttroff v. Sutherland, 49 F. 2d 944; Bowles v. Ohlhousen, 71 F. Supp. 199.

In Fix, Collector of Internal Revenue, vs. Philadelphia Barge Co., 290 U.S. 530, there had been a suit in assumpsit for federal taxes brought by collector McCaughn, Fix's predecessor in office. It was dismissed on a showing that McCaughn had ceased to be collector and no substitution made in the six months' period provided in 28 U.S.C. 780. It was contended that Fix's later suit for the same tax liability was barred by the dismissal of McCaughn's suit. The Supreme Court held to the contrary, stating of the act of 1899 as amended in 1925:

> "The act is purely remedial, designed to remove what this court in the Butterworth case called an 'inconvenience.' Failure to comply with the statute forecloses the particular rem-

*It is not necessary to distinguish the cited New Jersey case of Matthison vs. Payne, 119 Atlantic 711, since if not distinguishable it cannot overrule the LeCrone and other cases.

> edy therein provided; it does not destroy the right. There is a clear difference between the action and the Cause of action. Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending upon its nature and the applicable rule." (Emphasis supplied)

That is to say of the Act of 1925, using the exact words of the instant statute, the appearance within the limited period of the substitute officer, as here the Defense Supplies Corporation, creates a "revival of the action." If the "action" is not so revived, the court loses jurisdiction to consider it but the "cause of action" nevertheless remains to be litigated by the successor in a new action.

Here is answered the contention that the Defense Supplies Corporation will have lost its right of action against the appellants by its failure to appear in the limited period. On the contrary, after the twelve months it could have begun a new suit against appellants. That it now may have lost that right to sue by some statute of limitation is no more relevant here than it would have been to the holding in the Fix case.

So, also, the Fix case answers the contention, much urged, that the United States, owning the stock of the Defense Supplies Corporation, is the real party in interest in a recovery of damages against appellants. In that sense so was the United

States, with its Collector Fix suing for taxes for the federal treasury in his "official capacity" as tax collector.

However, we do not agree that the United States is the real party litigant where the Reconstruction Finance Corporation is sued or being sued. That is to say, that in all the scores of suits against that corporation, the complaint need not make it the defendant but may be brought against the United States alone, with a mere allegation that the corporation is its agent.

The case of Fleming v. Goodwin, 165 F. 2d 334, 338 (CCA 8), cited by the Finance Corporation, expressly distinguished Rule 25 (d), the successor to the Act of 1899, on the ground that the Price Control Administrator was authorized "by § 205 (e) of the Emergency Price Control Act to bring the action 'on behalf of the United States.' He was not authorized to bring it on his own behalf. . . ." So also, United States v. Koike, 164 F. 2d 155, 157. The Administrator there is a mere use plaintiff for the United States. Here the Reconstruction Finance Corporation sues on its own corporate behalf and not as use plaintiff for the United States.

We are not in accord with the decision of the Eighth Circuit of March 25, 1948, in Gaynor v. Metal Reserve Company, ... Fed. (2d) ..... The opinion there does not mention the McAdoo, Payne, Claussen or Fix cases. Passing on the statutory provisions indentical with the Act of 1899 and 1925, it treats the granting of the motion to dismiss as "the repudiation of a just debt" and that thereby

the liability would be "extinguished twelve months after the enactment of Public Law No. 109," though the Fix case shows the contrary. It relies on the dictum of the Oklahoma Natural Gas Co., considered infra, construing a different state statute, a decision before both the Claussen and Fix cases. It nowhere considers the Supreme Court's holdings that the court loses jurisdiction of the action commenced by the later defunct corporation and the action abates by non-appearance of the successor litigant, though the cause of action survives. It does not consider the statute's mandatory "shall" for the performance of the "function" of the successor litigant.

It is contended that the case of Anderson vs. Yunkau, 329 U.S. 482, overrules, sub silentio, the holdings in the LeCrone, Payne and Curran cases followed by the Court of Appeals and the District Courts, that the language used in the statutes there, identical with the Act of June 31, 1943, created a statute of limitation. In that case, the court was considering Rule 25(a) of the Rules of Civil Procedure providing:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." (Emphasis supplied)

This rule is confined to successor human litigants not corporations. The court held that 25(a) creates a statute of limitation and that one could not extend the limited period by a showing of excusable neglect under Rule 6(b). In the course of the discussion, the court states:

> "There would be more force in petitioner's argument if Rule 25(a) had, without more, set a two-year period within which substitution might be made. But Rule 25(a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6(b) should not be construed to override an express direction of action to be taken by the court. See Wallace v. United States, 142 Fed. 2d, 240, 244."

While we do not know what the court would have decided if the mandatory words "shall be dismissed" were not used; the statute of June 30, 1945, contains the mandate that whatever may be done after the dissolution of the Defense Supplies Corporation "shall" be done by the successor corporation, which we interpret to mean shall be done in the time limited. As stated of the Act of 1899, which is the predecessor of Rule 25(a); the time limit of the rule is meaningless if the substitution may be made after the limitation period has expired. The Statute of 1899 is without the words "the action shall be dismissed." Nevertheless, the LeCrone, Payne and Curran cases hold that the action must, that is

"shall," be dismissed after the period of limitation, and this although that act also states that no such action "shall abate," as Rule 25(a) provides that such action "shall continue." The phrase "shall be dismissed" of the rule is but the embodying of the Supreme Court's construction of its predecessor's statute.

It is also contended that the preceding LeCrone and Payne cases are overruled, without mentioning them, by the Supreme Court's opinion in Oklahoma Natural Gas Co. vs. Oklahoma, 273 U.S. 257, on writ of error from the Supreme Court of Oklahoma. The contention ignores the fact that Claussen vs. Curran was decided in 276 U.S., a year later, and Fix vs. Philadelphia Barge Co., in 290 U.S., seven years later. The gas company had been dissolved and the district judge had the option to choose a representative to settle its affairs or to appoint its director or managers who "may" perform the function "to maintain or defend actions" for the dissolved corporation. The statute concluded with the words "and no action whereto any such corporation is a party shall abate by reason of such dissolution." A successor corporation formed under the laws of Delaware moved to be substituted. The motion was denied, but in the discussion concerning "such" a corporation, the Court stated:

> "We have found no Oklahoma case that construes this provision with reference to the question now before the Court. The language of the section would seem to indicate that as there

is to be no abatement the Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court."

The Defense Supplies Corporation was not "such" a corporation. It was a corporation dissolved, of which the Court in the Oklahoma gas company case states:

"There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. Mumma v. Potomac Company, 8 Pet. 281; National Bank v. Colby, 21 Wall. 609; Pendleton v. Russell, 144 U.S. 640. * * * It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation pro hac vice. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is

necessary that there should be some statutory authority for prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being." (Emphasis supplied.)

The Defense Supplies Corporation created by Congress differed from Oklahoma corporation in that, instead of having several successors to be chosen by the court, there is but one which "shall" perform the function "to maintain or defend" suits againt the dissolved corporation. The Oklahoma statute has no time limitation within which to be substituted, while the Congressional act has such a limitation after which time the Supreme court has held of an identical provision that "the action shall not abate," that it does "abate" after the time period and that the court loses "jurisdiction" to consider it.

We do not think that the court's remarks concerning the Oklahoma statute overrule the LeCrone and Payne decisions. This is clear from the later decision of Claussen vs. Curran. We hold that these cases determine the interpretations of the Act of June 30, 1945. The motion of the Reconstruction Finance Corporation for substitution is denied. The motion of Lawrence Warehouse Company et al. is granted and we order set aside our judgment of affirmance of December 5, 1947, and the judgment of the District Court and remand the case to the District Court with instruction to enter an order dismissing the action.

Action ordered dismissed.

Healy, Circuit Judge, Dissenting.

The majority it seems to me have reached an unconscionable result on the basis of insubstantial and purely technical considerations. The statute does not justify, much less compel, the result. It has been arrived at by treating as an insuperable jurisdictional obstacle what ought, at most, be regarded as a procedural omission of no substantial prejudice to any party.

The pending controversy was initiated by motion of appellants Lawrence Warehouse Company and Capitol Chevrolet to vacate our affirmance of the judgment against them, Lawrence Warehouse Co., et al., v. Defense Supplies Corp., 164 F. 2d 773, and to remand the cause to the district court with instructions to dismiss, the ground of their motion being that when the judgment was entered against them in the district court that court was without jurisdiction to render it. Since the merits of the motion can not intelligibly be considered unless one has in mind the sequence of events leading up to the entry of the judgment, I summarize these happenings in the order of their occurrence.

In February of 1944 Defense Supplies Corporation began this suit, which was for damages for the allegedly negligent destruction by fire of a quantity of tires stored in appellants' warehouse. On February 13, 14, and 15, 1945, the case was tried to the court sitting without a jury. On January 9, 1946, the court announced a decision in favor of Defense Supplies holding it entitled to damages of approximately $42,000. On April 15, 1946, final judgment

to this effect was entered. In the interim between the trial of the case and its decision Congress passed the Joint Resolution of June 30, 1945, Public Law 109, 59 Stat. 310, effective July 1, 1945, dissolving certain governmental corporations, including Defense Supplies, and transferring their assets and liabilities to the Reconstruction Finance Corporation by which they had been set up in the first instance. The Resolution in its entirety is as follows:

"'Notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

"'Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No

suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

"Sec. 3. This joint resolution shall take effect on July 1, 1945."

We have here a suit which had been completely tried prior to the resolution's enactment, and it remained only for the court to reach a decision. Assuming that the point has importance, it is to be noted that as of the date of the entry of the judgment the twelve months' period prescribed in § 2 had not expired. It was thus undoubtedly within the authority of the court, preliminary to judgment, to order the substitution of the Reconstruction Finance Corporation. So much is conceded by counsel for appellants and possibly by my colleagues, although the latters' view of the matter is not clearly determinable. But the provisions of § 1 of the statute, transferring to Reconstruction Finance all assets of the dissolved corporations, requires us to go further and hold that as of the time of the judgment Reconstruction Finance, had it or Defense Supplies Corporation so moved, was entitled to be substituted unconditionally as a matter of right.

With the latter proposition my associates are in obvious disagreement. They stress the language of §2 providing that at any time within twelve months the court, on a showing of necessity for the survival of the suit or other proceeding "to obtain a determination of the questions involved," may allow it to be maintained by or against Reconstruction Finance Corporation. They say or imply that a showing of necessity for survival was imperative, that it was not made, and that if it had been the court possessed discretionary power to grant or deny substitution. For reasons already given and others now to be stated I regard the view as untenable on all counts.

It will be apparent on a moment's reflection that the provision stressed by my associates can not rationally be applied to a case like this and was not intended to be. The questions involved in the suit were the familiar ones arising in all cases of like character. They were whether negligence on the part of the defendants had caused or contributed to the property loss sustained by the government, and if so, the amount in money of the recoverable loss. This being an ordinary tort action where the plaintiff's right to damages had vested, the continuing necessity for the determination of the questions at issue would seem to be apparent on the face of the pleading. And, if this were not so, the necessity for their determination had already been amply demonstrated in the course of the trial. No additional showing of necessity was possible, and no reason existed for attempting to make one unless,

indeed, it were permissible to think that the government no longer needed to be compensated for its loss.

It is an accepted canon of construction that a statute is not to be construed as requiring a vain thing. I may add that the clause under consideration, while not germane to the situation before us doubtless has its uses. It appears to have been lifted from the existing statute having to do with a survival of suits against public officers in relation to the discharge of their official duties. In incorporating it into the resolution Congress would seem to have had in mind the possible existence of special circumstances where a change in conditions, such as the lapse of emergency legislation or the like, might have made decision of the points at issue of no more than academic interest or rendered futile or inappropriate the grant of the relief sought. Compare Fleming v. Mohawk Co., 331 U. S. 111, 119. The corporations dissolved, it is to be noted, had all been set up under emergency conditions.

The exposure of the inapplicability of this clause largely strips the jurisdictional holding of its plausibility, assuming that it had any to begin with, for we then have a case where the final step—the entry of judgment—was in no sense conditioned by the statute. But my associates' jurisdictional argument has other frailties. As I understand it, the premise on which they hold the judgment void is that there was before the court no party plaintiff in whose favor judgment could be rendered, Defense Supplies having for all purposes ceased to

exist. The holding fails to give effect to another clause embraced in the section, namely, the provision that no suit lawfully commenced by or against any of the dissolved corporations "shall abate by reason of the enactment of this joint resolution." Since pending actions were not to abate it would appear to have been the intent of Congress to extend the life of the dissolved corporation at least for the limited purpose of preserving its status as a party, thus keeping the suit intact. Hence, in any view of the status, there was no lack of a party plaintiff.[1]

The view I have expressed is in harmony with the interpretation given an analogous statute in Oklahoma Gas Co. v. Oklahoma, 273 U. S. 257, in a carefully considered opinion written by Chief Justice Taft. That case had to do with a motion for substitution of a successor corporation for one that had been dissolved. The Court observed that, as the death of a natural person abates all pending litiga-

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[1]The Eighth Circuit, in Gaynor v. Metals Reserve Company ..... F. 2d ....., decided March 25, 1948, reached a similar conclusion in a much more extreme situation than ours. Metals Reserve Company is one of the corporations dissolved by the resolution. It was a defendant in that case, having been sued in 1945 for sums claimed to be owing on contract and as damages. The cause was not brought on for trial to the enactment of the joint resolution, but was continued to the June 1947 term, at which it was dismissed on motion of Metals Reserve on the basis of the joint resolution. The Circuit Court reversed on the basis of the provision of the resolution to the effect that no pending suit against the dissolved corporations should abate.

tion to which such person is a party, dissolution of a corporation, at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. The Court went on to say that if the life of the corporation is to continue for litigating purposes there should be some statutory authority for its prolongation. Such authority was found in a local [Oklahoma] statute which made the directors of a dissolved corporation trustees of the creditors and stockholders, with full power to settle the corporate affairs. The statute concluded by providing that for such purposes the directors "may maintain or defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action whereto any such corporation is a party shall abate by reason of such dissolution." The Court said that "the language of the section would seem to indicate that as there is to be no abatement the Oklahoma Natural Gas Company [the dissolved corporation] for litigating purposes is still in being and continues to be a party before this Court." The motion for substitution was denied in light of this statutory provision, apparently in the belief that there was no necessity for substitution.[2]

The Oklahoma Gas Company case has immediate bearing on the legal and factual situation before us, and if its holding is to be accepted it vitiated en-

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[2]The reasoning of the opinion in the Oklahoma Gas Co. case was followed in Chicago Title and Trust Co v. Wilcox Building Corp., 302 U. S. 120.

tirely the jurisdictional argument. None of the cases cited by appellants or relied on by the majority presents a situation at all comparable with the present. One need not question either the soundness or the authority of those cases; they are simply not in point.

It is important to remember that the United States was at all times the real party in interest in this suit, that is to say, it was the real owner of the cause of action and its fruits. Southern Pac. Co. v. Reconstruction Finance Corporation, 9 Cir., 161 F. 2d 56. Compare Fleming v. Goodwin, 8 Cir., 165 F. 2d 334. This would, of course, be true whether judgment were rendered in favor of one or the other of the two corporations since both Defense Supplies and Reconstruction Finance were mere creatures of the government.[3] The failure to substitute one for the other in no sense prejudiced appellants. The latter were, moreover, charged with knowledge of the joint resolution, and their sins of omission must be measured on the assumption of their knowledge, not of their ignorance, of its provisions. They interposed no objection to the entry of judgment in favor of the dissolved corporation, and must, I am satisfied, be held to have waived the error, if error there was, in failing to order substitution.

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[3]Consult 28 USCA § 780a, enacted in 1933. This statute relates to actions to recover damages, brought by the United States or on its behalf. It shows a congressional policy requiring the survival of such actions in situations where they would ordinarily abate. This statute is of significance here.

The validity of the judgment is necessarily to be gauged as of the time of its entry. If valid then it would not be rendered void by lapse of time or in consequence of infirmities, if any, in the appellate proceedings which ensued. That Defense Supplies, for example, itself appealed—unsuccessfully, as it happened—from a phase of the judgment exonerating an individual defendant can be of no moment. The majority's emphasis of its conduct in this respect is on a parity with its emphasis of the inconsequential fact that counsel for Defense Supplies, who had conducted the trial, furnished their final brief in the trial court the day after the resolution's passage. Palpable red herrings both, I resign these circumstances and others like them to their peculiar office.

Appellants' motion should be denied. The motion of Reconstruction Finance Corporation for the amendment of the judgment by substituting its name as plaintiff in lieu of Defense Supplies was interposed as an alternative to its primary contention, namely, that the error, if any, in respect of the judgment was procedural only, and was waived by appellants' failure to object. For reasons already stated, I regard such an amendment as unnecessary. However we can and probably should grant the motion in the interest of ending further controversy. Compare Anderson v. Yungkau, 329 U. S. 482.

[Endorsed]: Opinion and Dissenting Opinion. Filed April 6, 1948, as amended by order of May 13, 1948, on denial of petition for rehearing. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11418

LAWRENCE WAREHOUSE COMPANY,

vs.

DEFENSE SUPPLIES CORPORATION.

CAPITOL CHEVROLET COMPANY,

vs.

DEFENSE SUPPLIES CORPORATION.

V. J. McGREW,

vs.

DEFENSE SUPPLIES CORPORATION.

DEFENSE SUPPLIES CORPORATION,

vs.

CLYDE W. HENRY.

JUDGMENT

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of Reconstruction Finance Corporation to be substituted for Defense Supplies, and motion of appellants to set

aside affirmance of District Court judgment and for dismissal of the action, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the motion of Reconstruction Finance Corporation to be substituted for Defense Supplies herein be, and hereby is denied, and that the motion of Lawrence Warehouse Company, et al., to set aside affirmance of District Court judgment and for dismissal of the action be, and hereby is granted, and that the judgment of this Court filed and entered on December 5, 1947, be, and hereby is vacated and set aside, and that the judgment of the said District Court in this cause be, and hereby is set aside, with costs in favor of appellants Lawrence Warehouse Company, et al., and against Defense Supplies Corporation, and that this cause be, and hereby is remanded to the said District Court with instruction to enter an order dismissing the action.

It is further ordered and adjudged by this Court, that the appellants Lawrence Warehouse Company, et al., recover against Defense Supplies Corporation for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 6, 1948.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday,
May 13, 1948

Before: Denman, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING MODIFICATION OF OPINION AND DISSENTING OPINION AND DENYING PETITION FOR REHEARING

Ordered that the opinion and dissenting opinion rendered by this Court on April 6, 1948, be amended pursuant to the order this day filed.

It Is Further Ordered that the petition of appellee and appellant Defense Supplies Corporation and Reconstruction Finance Corporation, filed May 6, 1948, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred twenty-eight (428) pages, numbered from and including 1 to and including 428, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for Defense Supplies Corporation and Reconstruction Finance Corporation, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of May, 1948.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 430] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

DEFENSE SUPPLIES CORPORATION and RECONSTRUCTION FINANCE CORPORATION, Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY and CAPITOL CHEVROLET COMPANY

ORDER

Upon Consideration of the application of counsel for the petitioners,

It Is Ordered that the time for filing petition for writ of certiorari, in the above-entitled cause be, and the same is hereby, extended to and including Oct. 1st, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 12th day of August, 1948.

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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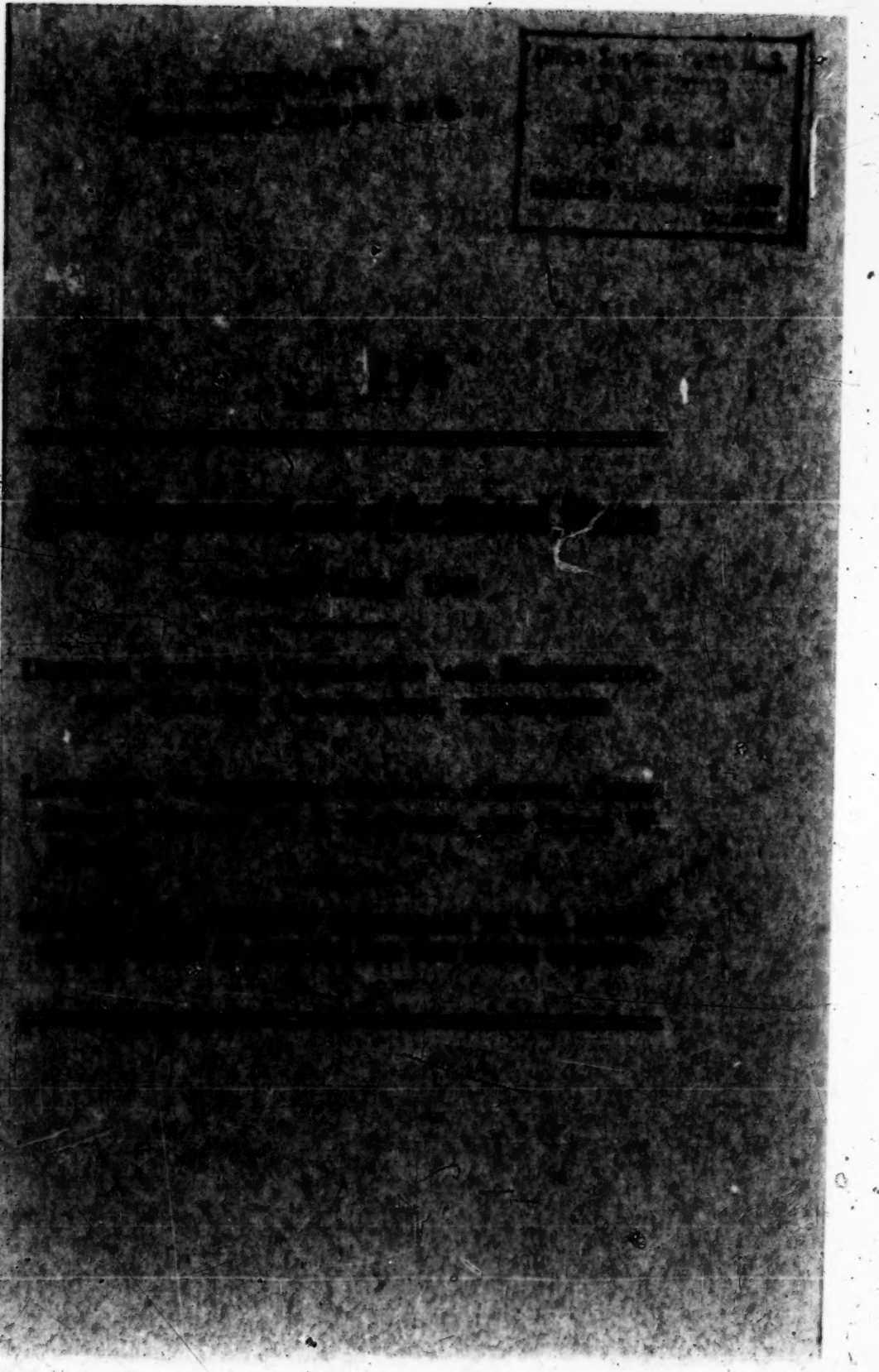

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. ——

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. MCGREW, AND CLYDE W. HENRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Defense Supplies Corporation and Reconstruction Finance Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 6, 1948.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit (R. 396–425) are reported at 168 F. 2d 199. Opinions of the Court of Appeals (R. 370–380) and of the United States District Court for the Northern District of California (R. 63–

75) previously handed down in this case but not concerned with the issues raised in this petition for certiorari are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426–427). A petition for rehearing, seasonably filed, was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code, enacted on June 25, 1948 (Public Law 773, 80th Congress, 2d sess.).

QUESTION PRESENTED

By the Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310), Congress provided for the dissolution, on July 1, 1945, of Defense Supplies Corporation and certain other government-owned corporations. It was provided, however, that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, a court, on proper showing, might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation. The question is whether, in the absence of the substitution of Reconstruc-

tion Finance Corporation within twelve months of Defense Supplies Corporation's dissolution, a court is required to dismiss, as abated, a suit which had been instituted by Defense Supplies Corporation and fully tried before its dissolution, and to vacate, as void, a judgment rendered during that twelve months in favor of Defense Supplies Corporation.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19),

are hereby designated as the corporations to which this joint resolution applies.

SEC. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

SEC. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT

This suit, for damages for the destruction of certain quantities of tires and tubes which had been delivered for storage by DSC to respondents Lawrence Warehouse Company ("the Lawrence Company") and Capitol Chevrolet Company ("the Capitol Company"), was commenced on February 16, 1944, with the filing of a complaint in the United States District Court for the Northern District of California (R. 3–10). At the close of the trial by the court, sitting without a jury, on February 13–15, 1945 (R. 98–351),

respondents moved for dismissal, and, after argument, the case was ordered submitted to the court on memoranda and continued to May 1, 1945 (R. 60–63).[1] On January 9, 1946, the court handed down its opinion, directing that judgment enter in favor of DSC for damages in the amount of $41,975.15, against the Lawrence Company, the Capitol Company, and McGrew, but exonerating respondent Henry from any liability (R. 63–75). A formal judgment to that effect was entered on April 15, 1946 (R. 83–84).[2] The findings of fact, entered on the same day, were to the effect that the quantities of tires and tubes delivered by DSC to the Lawrence Company and the Capitol Company for storage had been destroyed by fire because of the concurrent negligence of those two companies and respondent McGrew (R. 77–82).

A motion for a new trial filed on April 12, 1946, having been denied (R. 85–90), appeals were then taken to the United States Court of Appeals for the Ninth Circuit by the Lawrence Company (R. 90), the Capitol Company (R. 94), and McGrew

[1] Oral and documentary evidence was presented only by DSC, respondents electing not to offer any proof (R. 310). Constantine Parella and Charles Elmore, whom the complaint named as defendants in addition to respondents (R. 3), were dismissed from the action at the close of the trial without objection (R. 307).

[2] On January 9, 1946, an order had been made that judgment enter in favor of DSC against all respondents except Henry (R. 76). On April 3, 1946, an order had been entered settling the findings of fact (R. 77).

(R. 96), from the judgment against them, and by DSC (R. 92), from the judgment in favor of respondent Henry. On December 5, 1947, after argument, the Court of Appeals affirmed the judgment of the District Court in its entirety (R. 370–380), and on January 2, 1948, it denied petitions for rehearing filed by the Lawrence Company and the Capitol Company (R. 381).

It was at that point that, on February 17, 1948, the Lawrence Company and the Capitol Company filed a motion in the Court of Appeals, for the first time calling attention to the Joint Resolution of June 30, 1945, and requesting that, in view of the dissolution of DSC, and the failure of RFC to be substituted for it before July 1, 1946, the Court of Appeals should vacate its decision affirming the judgment of the District Court, and, upon reconsideration, enter an order remanding the case to the District Court with instructions to dismiss the action (R. 386–389). Thereupon, on March 2, 1948, petitioners moved that the pleadings and the judgment be amended to correct the "defect of form," by substituting RFC as party-plaintiff in place of DSC (R. 392–393). On April 6, 1948, the Court of Appeals, Judge Healy dissenting, denied petitioners' motion and granted respondents' motion, thus refusing to substitute RFC for DSC, vacating its previous affirmation of the District Court's judgment, and remanding the case to the District Court for dismissal (R.

396–427). Petitions for rehearing thereafter filed were denied on May 13, 1948, and the opinion and dissenting opinion rendered by the court on April 6, 1948, amended pursuant to an order filed the same day (R. 428).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Ninth Circuit erred:

1. In holding that DSC, after its dissolution, on July 1, 1945, had neither the power to continue and prosecute suits theretofore instituted by or against it and then pending, nor such capacity as would permit courts to enter judgments in its favor in such actions.

2. In holding that upon that dissolution of DSC, all such pending suits abated and could be revived only if, within twelve months thereafter, RFC was substituted in place of DSC.

3. In holding that in the absence of a substitution of RFC, any courts in which such suits are pending lose all jurisdiction to determine them.

4. In holding that the failure to effect such a substitution is a defect in jurisdiction and not in form.

5. In holding that the decisions of this Court in *LeCroune* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board*, 258 U. S. 613; and *United States ex rel. Chapman* v. *Curran*, 276 U. S. 530, control the construction of the Joint Resolution of June 30, 1945.

6. In granting the motion of the Lawrence Company and the Capitol Company filed with the court on February 17, 1948.

7. In vacating and setting aside its prior judgment of December 5, 1947, and the District Court judgment of April 15, 1948.

8. In remanding the case to the District Court with instructions to enter an order dismissing the action.

9. In failing to hold that DSC, even after its dissolution, on July 1, 1945, continued in existence at least for twelve months thereafter for the purpose of continuing pending actions and with such capacity as would permit courts to enter judgments in its favor in such actions.

10. In failing to hold that the real party-plaintiff in interest in this case was and is the United States.

11. In failing to grant petitioners' motion for an amendment of the pleadings and the judgments to substitute RFC for DSC as the party-plaintiff.

REASONS FOR GRANTING THE WRIT

The decision below, as Judge Healy remarks in his dissent, achieves "an unconscionable result on the basis of insubstantial and purely technical considerations" (R. 417). Here, the majority of the Court of Appeals vacates a $41,000 judgment for damages for the negligent destruction of government property, which that very

court had previously affirmed, and dismisses a suit begun more than four years ago, which has been completely tried and fully argued in the trial court and on appeal, not because it has any doubt as to respondents' liability, but solely because the government corporation in whose name the suit was brought and judgment was entered has been dissolved and its functions transferred to its parent corporation. With that dissolution, says the majority of the court below, DSC ceased to exist, it no longer had the capacity to continue the then pending litigation or to have a judgment rendered in its favor, and, absent the substitution of RFC within twelve months thereafter, the action abated and must now be dismissed. This notwithstanding the specific provision in the joint resolution that no suit theretofore commenced by or against DSC should abate by reason of its enactment.

The decision below is admittedly (R. 411) in conflict with the recent decision of the United States Court of Appeals for the Eighth Circuit in *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011, and in our view, it is the decision below which is wrong. In any event, a definitive construction of the Joint Resolution of June 30, 1945, by this Court is needed if the public interest is not to be prejudiced and additional protracted litigation is to be avoided.

1. In *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011, suit was brought against Metals Reserve

Company, another of RFC's subsidiary corporations whose existence was terminated by the Joint Resolution of June 30, 1945, to recover damages for the alleged breach of certain sales contracts. Process was served on Metals Reserve Company on March 30, 1945, and an answer filed by it on April 4, 1945. The case was then continued to the June 1947 Term, and on Metals Reserve Company's motion at that time, the District Court dismissed the action as abated, no substitution of RFC having been effected within the twelve-month period provided by the joint resolution. On appeal, however, the Eighth Circuit Court of Appeals held that abatement was precluded by the very language of the resolution, the provisions with respect to the substitution of RFC establishing a condition precedent to plaintiff's right to protect his action against that successor corporation, but not to his right to pursue the case against the dissolved subsidiary corporation. Considering it significant "that the resolution contains the imperative command that by the dissolution of the corporation no suit 'shall abate,' while the provision with reference to substituting Reconstruction Finance Corporation * * * is clearly permissive, as indicated by the use of the word 'may'" (166 F. 2d at 1014), the court said:

> * * * the Metals Reserve Company, for the purpose of litigating plaintiff's claim, is still in being. That plaintiff

> failed to take proceedings for the substitution of the Reconstruction Finance Corporation can in no manner affect the liability of defendant Metals Reserve Company. It can have no concern with the question as to whether plaintiff has preserved his right to seek relief against the Reconstruction Finance Corporation. Certainly, the failure to make such a motion was no ground for dismissing the action as against the defendant Metals Reserve Company * * * (166 F. 2d at 1015).

The case was, therefore, remanded to the District Court.

Thus, in the *Gaynor* case, where there had been no trial of the facts at all, the United States was required to defend litigation instituted prior to June 30, 1945, against a government corporation whose dissolution was held not in the least to affect the vitality of the suit; whereas, on the other hand, in the present case, where there has been a full trial and judgment has been rendered and affirmed on appeal, the Government is prohibited from taking the benefits of that judgment solely because of the dissolution of the corporation in whose name the suit was initiated. The court below expressly noted that it was "not in accord" with the *Gaynor* decision. R. 111.

2. In our view, the Court of Appeals for the Eighth Circuit and not the court below correctly applies the joint resolution. Underlying the decision below are these assumptions: (1) that the

Joint Resolution of June 30, 1945, required the absolute dissolution of DSC; (2) that, consequently, after July 1, 1945, DSC was no longer in existence for any purpose whatever; and (3) that suits then pending by or against it could be revived only by the formal substitution, within twelve months thereafter, of RFC for DSC. Neither the history nor the letter of the joint resolution justifies so harsh a construction, and to adopt it would be to defeat the very purpose of the enactment.

The legislative history of the Joint Resolution of June 30, 1945, indicates, as the Eighth Circuit Court of Appeals remarks, "that it was the purpose of Congress to protect all vested rights by this positive declaration that the dissolution of the corporation should not disturb * * * vested rights not that any action lawfully commenced should be abated" (156 F. 2d at 1014). That Congress sought to achieve that end by prolonging the life of the subsidiary corporation

The provisions against abatement and for substitution of RFC were absent from the original draft of the resolution introduced by Senator Wagner and seem to have been added, while the resolution was in Senate Committee, in response to Senator Taft's suggestion that "there should be a specific statement that R. F. C. should become responsible for the liabilities and contracts" of the subsidiary corporations to be dissolved. Hearings before Committee on Banking and Currency, U. S. Senate, on S. J. Res. No. 65, 79th Cong., 1st sess., pp. 10, 11; see, also, S. Rep. No. 285; H. Rep. No. 816; and Hearings before Committee on Banking and Currency, H. of Rep. on S. J. Res. No. 65; all in 79th Cong., 1st sess.

at least for twelve months and for purposes of continuing pending litigation, seems clear from the fact that only six months later, in the same session, Congress, in passing the Act of December 6, 1945 (c. 557, 59 Stat. 597) for the financial control of "wholly owned Government corporations," defined that term as including, among other named agencies, "Defense Supplies Corporation" and the other corporations whose dissolution was decreed by the June resolution. Obviously, then, the very Congress which had provided for its dissolution in July considered that DSC was still in existence in December 1945, at least for some purposes, despite its prior dissolution.

The Joint Resolution of June 30, 1945, is similar in purport to a large body of similar statutes in the states, which "are designed to continue the life of the corporation for a definite or indefinite period after its dissolution, and either expressly or impliedly authorize suits and actions by and against it in its corporate name, during the time its existence is thus perpetuated." 16 Fletcher, Cyc. Corp., §8143; see Note, 47 A. L. R. 1397, *et seq.* Such statutes are remedial in character and should be afforded a liberal reading. *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449, 450 (C. C. A. 2); *Eastman, Gardiner & Co.* v. *Warren*, 109 F. 2d 193 (C. C. A. 5). And the absence of an express provision for continuance of the cor-

poration is not significant; in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, notwithstanding the absence of such a provision in the Oklahoma statute, which, however, like the statute here involved contained a provision that pending actions should not abate, the Court held that "Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court." 273 U. S. at 260.

The joint resolution, then, when properly read, has the effect of prolonging the existence of DSC for the purposes of pending litigation. This by no means makes the twelve-month limitation in the statute meaningless, as the court below suggests (R. 401–402). The Eighth Circuit Court of Appeals construes that limitation as applicable only to the right which the resolution grants to litigants to hold the successor and still going corporation; RFC, responsible for DSC's debts (*Gaynor v. Metals Reserve Co.*, 166 F. 2d 1011, 1014), and that is by no means an unreasonable construction. But even if the twelve-month limitation was intended to affect rights of and against DSC, we submit that there is compelling logic for construing it liberally and only to preclude the continuance of litigation beyond the twelve-month period; during that period, by virtue of the joint resolution, DSC remained in existence for purposes of pending litigation. Since the judgment entered here in DSC's favor, in April 1946, was

well within the twelve-month period, it was a valid Judgment (see *National Bank* v. *Colby*, 21 Wall. 609, 615; *In re Aughenbaugh*, 38 F. Supp. 212, 213–214 (M. D. Pa.)), and the termination of the twelve-month period pending the appeal from that judgment did not impair the judgment's validity. See *Walling* v. *Reuter Co.*, 321 U. S. 671; *Yerxa, Andrews & Thurston, Inc.* v. *Viviano*, 44 S. W. 2d 98; *Steinhauer* v. *Colmar*, 11 Colo. App. 494; *Bank of Alexandria* v. *Patton*, 1 Rob. (Va.) 499, 525; 16 Fletcher, *Cyc. Corp.*, § 8154.

3. The decisions of this Court upon which the court below relies—*LeCrome* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590—do not support its ruling. They were concerned with statutes which, in material respects, were considerably different from the Joint Resolution of June 30, 1945.

United States ex rel. Claussen v. *Curran*, 276 U. S. 590, which the majority of the Court of Appeals cited as particularly conclusive of the instant case, was concerned with the Act of February 13, 1925 (c. 229, 43 Stat. 936, 941), which provided, in pertinent part, that pending cases against an officer of the United States who died or resigned might be permitted to be continued against his successor in office "if within six months after his death or separation * * *

it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. The 1925 statute, however, lacked the clear declaration, present in the Joint Resolution of June 30, 1945, that pending litigation should not abate. And the survival of pending litigation was there specifically made conditional on timely substitution, whereas, in the 1945 resolution, no language appears importing such a condition to survival. In *LeCrone* v. *McAdoo*, 253 U. S. 217, and *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613, which dealt with the 1899 predecessor to the 1925 Act (Act of February 8, 1899, c. 121, 30 Stat. 822), a statute much more like the 1945 resolution in language, though the writs of error were dismissed, the judgments below were not disturbed; thus, the failure to effect an appropriate substitution was deemed only to have deprived this Court of authority to review the decisions of the lower courts, but not to have required the abrogation of those judgments and the dismissal of the actions, as in the *Claussen* case, where the 1925 statute was controlling.

Moreover, the *Claussen*, *LeCrone*, and *Payne* cases are none of them in point, because the 1899 and 1925 Acts, with which they were concerned, were radically different in genesis and design from the June 30, 1945 resolution. Those two Acts were general statutes intended to afford relief from the common-law rule that *personal* actions by or against public officers abated upon

their death or separation from office. See *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *Irwin* v. *Wright*, 258 U. S. 219. The *Claussen*, *LeCrone*, and *Payne* cases were all such personal suits. An action at common law involving a continuing duty of the public office, rather than the personal performance of the individual officer, did not, however, abate upon his separation from office. *Thompson* v. *United States*, 103 U. S. 480; *Marshall* v. *Dye*, 231 U. S. 250; *Bowden* v. *Johnson*, 107 U. S. 251, 264; *Murphy* v. *Utter*, 186 U. S. 95; *People ex rel. Chicotte* v. *Best*, 187 N. Y. 1; *Weadon* v. *Shahen*, 50 Cal. App. 2d 254. Thus, such actions presented no problem of abatement, no relief was needed in such cases, the 1899 and 1925 statutes were not intended to apply to them, and certainly they were not meant to abate them. Cf., *e.g.*, *Murphy* v. *Utter*, 186 U. S. 95 with *Ex parte La Prade*, 289 U. S. 444, 456–457. The instant suit clearly is one of this latter type of action; it was instituted in a representative capacity; it is in no sense a personal suit. See *United States* v. *Summerlin*, 310 U. S. 414, 416; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249-250.[1] The construction which the courts have

[1] There can be little question that the United States is the real party in interest in this suit. As alleged in the complaint (R. 4) and found by the District Court (R. 78), the entire capital stock of DSC was owned by the United States, and the corporation was no more than "an agency, arm and instrumentality of the United States" engaged solely in carrying

afforded to the 1899 and 1925 Acts is, therefore, wholly irrelevant to the case in hand, particularly in light of the express provision in the Joint Resolution of June 30, 1945, against abatement. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 337–338 (C. C. A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828.

4. Even were one to accept the basic assumption of the decision below, that the Joint Resolution of June 30, 1945, terminated the existence of DSC as of July 1, 1945, even for the limited purpose of continuing pending litigation, the judgment in favor of the Government, we submit, should not have been vacated, and the action should not have been dismissed. In such circumstances, well-established equitable principles require that the case be remanded to the District

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out governmental purposes. See, also, *Southern Pacific Co.* v. *Reconstruction Finance Corporation*, 161 F. 2d 56, 58 (C. C. A. 9); cf. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524; *Cherry Cotton Mills, Inc.* v. *United States*, 327 U. S. 536, 539; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 384. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, does not require that the reality of the Government's interest in suits instituted by or against its corporate agencies be disregarded. At the most, it stands for the proposition that where government corporations are concerned, a waiver of immunity to suit should be liberally construed (*F. H. A.* v. *Burr*, 309 U. S. 242, 245; cf. *United States* v. *Shaw*, 309 U. S. 495, 501; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523), thus differing from the rule of strict construction where the sovereign *eo nomine*, rather than one of its corporate instrumentalities, waives immunity (*United States* v. *Shaw*, *supra*, at 502–503; *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506, 513, 514).

Court with directions that a judgment for DSC be entered *nunc pro tunc* as of a date prior to its dissolution. *Shakman* v. *United States Credit System Co.*, 92 Wisc. 366; *Florida Development Co.* v. *Polk County National Bank*, 76 Fla. 629; cf. *Mitchell* v. *Overman*, 103 U. S. 62; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *City of New Orleans* v. *Warner*, 176 U. S. 92; *Bell* v. *Bell*, 181 U. S. 175; Notes, 3 A. L. R. 1403, 68 A. L. R. 265. Resort to such a device to avoid the consequences of corporate dissolution is especially justified in furtherance or protection of the public interest. Cf. *Walling* v. *Reuter Co.*, 321 U. S. 671, 674–675. The inequities of a contrary course are apparent here; respondents, found at fault in the destruction of government property, are to be relieved of a judgment against them solely because, more than three years after the case was tried and after judgment had been rendered and affirmed on appeal, it called attention to a three-year-old statute dissolving the corporation.

5. A resolution by this Court of the conflict between the Eighth and Ninth Circuit Courts of Appeal is important to the United States. It is impossible to ascertain, with any accuracy, the number of cases which may be affected by the decision below. But there was a considerable body of litigation pending on July 1, 1945, by and against the corporations named in the Joint Resolution of June 30, 1945. It cannot be de-

ermined in how many such cases, then pending nd since presumed to have been closed, an ffort will now be made by the unsuccessful parties, on the basis of the decision below, to ave the judgments which may have been entered vacated and the actions dismissed as abated. See Rule 60 (b), Federal Rules of Civil Procedure, as amended.

CONCLUSION

For the foregoing reasons, it is respectfully ubmitted that this petition for a writ of ertiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1948.

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No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CHESTER DAIRY PRODUCTS COMPANY, T. J. McGRAW, AND CLYDE W. HEATER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 298

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION, PETITIONERS

v.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. MCGREW, AND CLYDE W. HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit (R. 396–425) are reported at 168 F. 2d 199. Earlier opinions of the Court of Appeals (R. 370–380) and of the United States District Court for the Northern District of California (R. 63–75) not concerned with the issues now before the Court are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426–427). A petition for rehearing, seasonably filed, was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The petition for a writ of certiorari was filed on September 24, 1948, and granted on November 8, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTION PRESENTED

The Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310) provided for the dissolution on July 1, 1945, along with other named government corporations, of Defense Supplies Corporation, and for the transfer to Reconstruction Finance Corporation of all its functions, powers, duties, and authority, together with all its assets and liabilities, to be administered "as if originally vested in Reconstruction Finance Corporation." It also provided that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, on a proper showing, the court might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation.

An action instituted by Defense Supplies Corporation was fully tried and argued prior to July 1, 1945. A judgment on the merits was rendered in favor of Defense Supplies Corporation during the subsequent twelve month period and, on appeal, was affirmed on the merits thereafter. The question presented is whether in these circumstances the joint resolution required the judgment to be vacated and the action to be dismissed as abated where no substitution was made and the court was not advised of the statutory dissolution by any of the parties until more than thirty-one months after the event.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Re-

serve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

SEC. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

SEC. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT

On February 16, 1944, Defense Supplies Corporation (DSC) brought suit for damages for the destruction of certain quantities of tires and tubes which had been delivered for storage to respondents, Lawrence Warehouse Company and Capitol

Chevrolet Company (R. 3–10). The case came on for trial by the court sitting without a jury on February 13, 1945 (R. 60). Two days were consumed in hearing plaintiff's witnesses (R. 60–62, 98–351) and at the close of their testimony the complaint was dismissed without objection with respect to Constantine Parella and Charles Elmore, whom the complaint named as defendants in addition to respondents (R. 61–62, 307). After moving to dismiss the action at the close of plaintiff's proof (R. 62–63, 308), respondents agreed not to offer any evidence but to let the decision of the court be based upon plaintiff's evidence and respondents' motion (R. 310). Thereupon, on February 15, 1945, the case was argued before the district court (R. 310). After hearing argument the court on February 15, 1945, ordered that the motions to dismiss and the cause be submitted for consideration and decision on memoranda to be subsequently filed, and that the case be continued to May 1, 1945, for submission (R. 63).

On January 9, 1946, the district court filed its opinion (R. 63–75), and ordered the entry of judgment in favor of DSC for damages in the amount of $41,975.15, against the Lawrence Company, the Capitol Company, and McGrew, but exonerating respondent Henry from any liability (R. 76). Findings of fact and conclusions of law were entered on April 15, 1946, to the effect that the quantities of tires and tubes delivered by DSC

to the Lawrence Company and the Capitol Company for storage had been destroyed by fire because of the concurrent negligence of those two companies and respondent McGrew (R. 77–82). Judgment in favor of DSC for damages and costs for slightly in excess of $42,000 and against DSC with respect to Henry was entered the same day (R. 83–84). Notices of appeal were filed in June 1946 by the Lawrence Company and DSC (R. 90, 92), and in July by Capitol Company and McGrew (R. 94, 96). On December 5, 1947, after argument, the court below affirmed the judgment of the district court in its entirety (R. 370–380), and on January 2, 1948, denied petitions for rehearing filed by the Lawrence Company and the Capitol Company (R. 381).

The cause had proceeded to this point solely on the merits of the controversy and no reference had been made in the proceedings by any of the parties to the Joint Resolution of June 30, 1945 (*supra*, p. 3). On February 17, 1948, for the first time, the Lawrence Company and the Capitol Company called attention to the Joint Resolution by filing a motion which requested the Court of Appeals to vacate its judgment of affirmance and to direct the district court to dismiss the action because of the dissolution of DSC and the failure of RFC to be substituted before July 1, 1946 (R. 386–389). Thereupon, on March 2, 1948, petitioners moved that the findings and the judg-

ment be amended to correct the "defect of form" by substituting RFC as plaintiff in place of DSC (R. 392–393). On April 6, 1948, the Court of Appeals denied petitioners' motion for the substitution of RFC and granted respondents' motion to vacate its previous judgment of affirmance and to remand the case to the district court with instructions to dismiss the action (R. 426–427) holding that the action abated because the court lost jurisdiction to consider it upon the failure of the parties to effect the substitution of RFC within a year of July 1, 1945 (R. 396–416). Judge Healy dissented (R. 417–425) on the ground that the court "reached an unconscionable result on the basis of insubstantial and purely technical considerations" which was "arrived at by treating as an insuperable jurisdictional obstacle what ought, at most, be regarded as a procedural omission of no substantial prejudice to any party" (R. 417).

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Ninth Circuit erred:

1. In holding that DSC, after its dissolution, on July 1, 1945, had neither the power to continue and prosecute suits theretofore instituted by or against it and then pending, nor such capacity as would permit courts to enter judgments in its favor in such actions.

2. In holding that upon that dissolution of DSC, all such pending suits abated and could be revived only if, within twelve months thereafter, RFC was substituted in place of DSC.

3. In holding that in the absence of a substitution of RFC, any courts in which such suits are pending lose all jurisdiction to determine them.

4. In holding that the failure to effect a substitution is a defect in jurisdiction and not in form.

5. In holding that the decisions of this Court in *LeCrone* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, control the construction of the Joint Resolution of June 30, 1945.

6. In granting the motion of the Lawrence Company and the Capitol Company filed with the court on February 17, 1948.

7. In vacating and setting aside its prior judgment of December 5, 1947, and the district court judgment of April 15, 1948.

8. In remanding the case to the district court with instructions to enter an order dismissing the action.

9. In failing to hold that DSC, even after its dissolution, on July 1, 1945, continued in existence at least for twelve months thereafter for the purpose of continuing pending actions and with such capacity as would permit courts to enter judgments in its favor in such actions.

10. In failing to hold that the real party plaintiff in interest in this case was and is the United States.

11. In failing to grant petitioners' motion for an amendment of the pleadings and the judgments to substitute RFC for DSC as the party plaintiff.

SUMMARY OF ARGUMENT

The court below erroneously held that the Joint Resolution of June 30, 1945, required a judgment in the amount of $42,000, affirmed on appeal, rendered in favor of Defense Supplies Corporation for the negligent destruction of Government property to be vacated because Reconstruction Finance Corporation had not been substituted for DSC within twelve months after the effective date of the joint resolution. The joint resolution provided for the transfer of all functions, assets and liabilities of named Government corporations, including DSC, to RFC, and for the dissolution of the named corporations. It further provided that no action by or against any of the dissolved corporations should abate by reason of the enactment of the joint resolution but that, upon a proper showing, the court might allow the action to be maintained by or against RFC. The trial of the action had been completed before the enactment of the joint resolution. The judgment of the district court was rendered before the expiration of the twelve month period. Thereafter an appeal had been taken and the judgment was

affirmed on the merits. The suggestion of a defect in parties was not made until two years after the judgment of the district court and thirty-one months after the enactment of the joint resolution.

It is the Government's position that it was not the purpose of the joint resolution to require substitution of RFC within twelve months as a condition to further proceedings and to the continued validity of a judgment in favor of one of the dissolved corporations. The legislative history of the enactment discloses that the original draft of the joint resolution prepared by RFC contained a single section which provided simply for the transfer of all functions, assets and liabilities of the dissolved corporations to RFC with the same effect "as if originally vested in Reconstruction Finance Corporation." Nothing more was thought necessary to change the form in which the Government would thereafter carry on its functions. The language in section 2 upon which the court below placed main reliance to reach its conclusion was inserted, as the result of a suggestion by Senator Taft, to make certain that none of the rights of creditors of the dissolved corporations would be impaired by the legislative action. There is not a shred of evidence of any intention to make the assertion and perfection of rights conditional upon compliance with additional procedures.

As a further matter, the language actually inserted, considered apart from the legislative

background, does not support the conclusion of the court below. Section 2 contains an "imperative command" that no action "commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution." Comparable language has been construed by this Court to continue the life of a dissolved corporation for the purpose of pending litigation. *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257. Moreover, the very Congress which enacted the dissolving statute recognized the continued existence of the "dissolved" corporations in a measure adopted some months later. For these reasons and others, the permissive language in section 2, which authorizes the substitution of RFC in the discretion of the court upon a showing of specified circumstances, should not be construed to make substitution mandatory in all cases as a condition to the continuation of litigation.

Even if the permissive language be construed as requiring substitution in all cases, the judgment rendered in the instant case should not have been vacated. The judgment was rendered by the district court when DSC was still in existence and remained valid even on the assumption that its powers expired for all purposes at the close of twelve months after the effective date of the joint resolution. The decisions of this Court establish that the subsequent termination of corporate powers does not vitiate a judgment valid when ren-

dered. See, particularly, *Walling* v. *Reuter Co.*, 321 U. S. 671. Moreover, the plaintiff in the action was in reality the United States so that the style in which the suit was brought was merely a formal matter. The failure to substitute one Government corporation for another, when both were acting as agencies of the United States, was therefore at most a formal defect. The order of the court below to vacate the district court's judgment because of a defect in form is contrary to statutory direction and the decisions of this Court.

ARGUMENT

The question for decision is whether, under the circumstances presented, the Joint Resolution of June 30, 1945 (*supra*, pp. 3–4), required the vacation of a judgment rendered in favor of Defense Supplies Corporation because of the failure to substitute Reconstruction Finance Corporation, its parent and successor, as party plaintiff. Section 1 of the joint resolution provided for the transfer to RFC of all the powers and duties, together with all the assets and liabilities, of designated wholly-owned government corporations including DSC. It further provided for their administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation" and for the dissolution of the named corporations. Section 2 of the joint resolution reiterated the assumption by RFC of "all liabilities" of the dis-

solved corporations, provided that no action commenced by or against any of the corporations "shall abate by reason of the enactment of this joint resolution," and authorized the court to permit any action commenced by or against a dissolved corporation, upon the filing of a motion within twelve months after the date of enactment "showing a necessity for the survival * * * to obtain a determination of the questions involved," to be maintained by or against the RFC. Section 3, the final section of the joint resolution, designated July 1, 1945, as its effective date.

The present action was commenced in February 1944 and the trial was concluded in February 1945. The decision of the district court directing the entry of judgment in favor of DSC was filed in January 1946. Findings and a formal judgment were entered in April 1946. Thus the trial of the action was concluded several months before the joint resolution was enacted and all proceedings in the district court relating to the awarding of judgment were completed before the expiration of twelve months after its enactment. No attempt to effect the substitution of RFC was made until some two years later, after the district court judgment had been affirmed on appeal on the merits, when respondents suggested the abatement of the action because RFC had not been substituted. The majority of the court below held that the failure to substitute RFC within

twelve months of the effective date of the joint resolution rendered void the judgment entered before the expiration of this period and directed the district court to dismiss the action.

The decision of the court below deprives the United States of a judgment of some $42,000 awarded for the negligent destruction by respondents of government property. The judgment was awarded after a complete trial on the merits which was subsequently affirmed on appeal. The suggestion of a defect in the proceedings was first made four years after the suit had been instituted, three years after the conclusion of the trial in the district court, and more than two months after affirmance on the merits of the district court's judgment by the Court of Appeals. Respondents' motion to vacate the judgment of affirmance and direct dismissal of the action as abated was made more than thirty-one months after RFC succeeded by statute to the functions, assets, and liabilities of DSC.

It is the Government's position that private interests should not stand to be thus enriched at the expense of the public treasury. Respondents had their day in court and lost on the merits of the cause. They prosecuted an appeal on the merits which also went against them. It was error, in these circumstances, we contend, to set aside this meritorious judgment affirmed on appeal on the extremely technical ground that the

name in which the Government originally asserted its cause of action was required to be changed by a subsequent statutory enactment. It is inconceivable that when Congress enacted the Joint Resolution of June 30, 1945, it contemplated the possibility of its interpretation to permit or require the forfeiture of a money judgment obtained on behalf of the United States. If the language and background of the statute clearly pointed in this direction, we would suppose that it would be followed most reluctantly. The legislative history of the enactment, however, contains nothing to suggest this intention and comparable statutory language has been construed by this Court to negate abatement. Moreover, the application of any one of several principles adopted by this Court and other courts in analogous situations requires reinstatement of the judgment in favor of the Government.

I

THE JOINT RESOLUTION DID NOT REQUIRE SUBSTITUTION IN INSTANT CASE

The decision of the court below rests principally on the language in Section 2 of the joint resolution to the effect that "the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determina-

tion of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." It was the conclusion of a majority that this provision made substitution a jurisdictional prerequisite to further proceedings and that failure to substitute within twelve months was a fatal and irremedial defect. We submit that neither the language itself, considered in its context, nor the circumstances responsible for its presence in the joint resolution justify these conclusions.

A. THE STATUTORY BACKGROUND

The joint resolution in question was proposed by the RFC to permit the consolidation into RFC of various subsidiary corporations created to perform specific functions in the national emergency.[1] Hearings before Senate Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st sess., p. 2. The purposes for which the corporations were established had been substantially accomplished and "some administrative reorganization at this time is desirable. The transfer to the Reconstruction Finance Corporation of the

[1] Pursuant to the terms of 15 U. S. C. 606 b (3) DSC was charted by RFC, at the request of the Federal Loan Administrator with the approval of the President, as a wholly owned subsidiary of RFC on August 29, 1940. 13 C. F. R. (1941 Supp.) 1566–1568. The charter recited "that the corporation shall be an instrumentality of the United States" and "that this Charter and the By-Laws may be amended at any time by Reconstruction Finance Corporation." *Id.* at 1568.

functions, powers, duties, and authority of these corporations would simplify operations and it may reasonably be expected that some economy in operation can be effected." *Ibid.*

As originally proposed the joint resolution consisted in its entirety of what is now Section 1 and contained no reference whatever to survival of actions or substitution. *Id.* at p. 1. The original language was intended, and was apparently considered sufficient, to make RFC responsible for all liabilities and contracts of the dissolved corporations. *Id.* at pp. 10–11. Since no specific mention was made of liabilities being asserted in court proceedings, the language of Section 1 providing for administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation" presumably was considered adequately broad to cover the situation. This clearly suggests a contemplated continuity of all the functions of DSC in RFC with the change in name a legal formality. See pp. 37–42, *infra*. The formal nature of the transfer is evidenced by the further facts that "management would remain where it is now, in the Board of Directors of the Reconstruction Finance Corporation, the members of which at the present time are also the directors of the corporations" and that "no transfer of personnel would be required, since all the corporations affected by the resolution are now staffed with R. F. C. employees." *Id.*, at pp. 2–3.

Section 2, which gives rise to the present controversy, is present in the resolution only because of a suggestion by Senator Taft that it might more effectively carry out the original intent of RFC. It is clear that there was no purpose to create procedural obstacles or impose conditions to the maintenance of actions already commenced but rather to facilitate the assertion of rights. In fact, there is reason to believe that Section 2 was designed solely to aid creditors of DSC in enforcing their rights and was never intended to affect the rights of the Government.

The hearings before the Senate Committee reflect the reason for the additional language in the joint resolution. "In regard to the legal implications of this bill," Senator Taft raised the question "whether there should be a specific statement that R. F. C. shall become responsible for the liabilities and contracts of these corporations," and "whether it might not be desirable, in order that contractors might not be in doubt, to have the express statement that all liabilities and contracts of these corporations shall be passed on to R. F. C. and that R. F. C. shall become responsible for them." *Id.*, at pp. 10–11. John W. Snyder, Federal Loan Administrator at the time,[2] who testified for the RFC, explained that "that was the intention."

[2] 1939 Reorganization Plan No. 1, § 402, 4 F. R. 2727, 53 Stat. 1429, provided that the administration of RFC should be supervised by the Federal Loan Administrator.

Id., at p. 11. Senator Taft then suggested a clarifying amendment to be drafted by the RFC general counsel. *Ibid.* There was no further discussion of the matter and the joint resolution was unanimously reported six days later with the present Section 2 as an amendment. 91 Cong. Rec. 4782, 5628; S. Rep. No. 285, 79th Cong., 1st sess. The measure was passed by the Senate shortly thereafter without discussion. 91 Cong. Rec. 5628.

The House adopted the bill as approved by the Senate without change and without any discussion relating to the amendment or its possible effect. 91 Cong. Rec. 6959; H. Rep. No. 815, 79th Cong., 1st sess.; Hearings before House Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st sess. The only relevant discussion, a colloquy between Representative Spence, chairman of the committee, and Representative Martin of Massachusetts, confirms the intention of Congress to accomplish nothing more than a simplification of the governmental machinery for carrying on certain functions by dissolving a number of corporations and providing a mechanism for continuing their functions. The discussion follows (91 Cong. Rec. 6958):

> Mr. MARTIN of Massachusetts. It merely provides for the dissolution of a number of agencies?

Mr. SPENCE. That is correct.

Mr. MARTIN of Massachusetts. It provides for nothing else?

Mr. SPENCE. It provides for nothing else.

* * * * *

Mr. SPENCE. * * * It merely transfers certain rights, duties, authority, and assets of these corporations to the Reconstruction Finance Corporation for the orderly dissolution of the corporations and the continuation of such functions as are required to be continued.

The legislative background thus discloses that Section 2 of the joint resolution was not intended to have any independent effect but was merely incorporated out of an abundance of caution to assure creditors and contractors of DSC the preservation of their rights against RFC. Further corroboration of this conclusion may be found in the wording of the opening sentence of Section 2 which provides that "the Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution." It will be noted that no mention is here made of obligations owing to the dissolved corporations although the transfer of both assets and liabilities of the dissolved corporations were treated together in the original proposal which remains as the first section of the joint resolution as amended. It is thus apparent that

the amendment was calculated to meet the limited suggestion of Senator Taft. We submit that the court below misconceived the purpose of Section 2 when it interpreted the provision, incorporated out of an abundance of caution to protect the rights of creditors, as requiring that a judgment in favor of the Government, awarded and affirmed on the merits, be vacated because of a failure to invoke the discretionary substitution provision within the twelve-month period.

B. THE STATUTORY LANGUAGE

The statutory language, even considered apart from its Congressional history, does not support the result reached by the court below. As already pointed out, the first sentence in Section 2 relates exclusively to liabilities of the dissolved corporations and thus manifests the preoccupation of the section with actions against rather than actions by the dissolved corporations. The remaining language of the section furnishes additional support for the Government's position that it was entitled to have its judgment remain intact. The provision that "No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * *" is similar to statutory language which this Court has construed to continue the life of a dissolved corporation for the purpose of pending litigation. *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273

U. S. 257. The Oklahoma statute there involved provided that "no action whereto any such [dissolved] corporation is a party shall abate by reason of such dissolution." Although the corporation in question had been legally dissolved, the Court stated that "The language of the section would seem to indicate that as there is to be no abatement the Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court" (p. 260). Thus it would seem that the provision against abatement in the joint resolution should be similarly construed to continue the life of DSC for litigation purposes without requiring that anything further be done. "It is not necessary to revive a suit upon dissolution of a corporate party, nor to substitute the corporation's trustees as parties, where under the law the suit is not abated." 16 Fletcher, Cyclopedia of Corporations, § 8151.

The sole prerequisite to the continued existence for litigating purposes of a dissolved corporation is the intent of the creating sovereign. *National Bank v. Colby*, 21 Wall. 609, 615; *Title Co. v. Wilcox Bldg. Corp.*, 302 U. S. 120, 125. The practice of continuing the life of dissolved corporations to permit the completion of litigation is a common one. The Joint Resolution of June 30, 1945, in providing against abatement of pending actions, is similar in purport to a large

body of similar state statutes which "are designed to continue the life of the corporation for a definite or indefinite period after its dissolution, and either expressly or impliedly authorize suits and actions by and against it in its corporate name, during the time its existence is thus perpetuated." 16 Fletcher, Cyclopedia of Corporations, § 8143; see Note, 47 A. L. R. 1397, *et seq.* The intention of Congress to keep alive, for at least some purposes, the corporations dissolved by the joint resolution on July 1, 1945, is made clear beyond question not only by the express provision against abatement in the dissolving resolution but also by its own recognition five months later that DSC was still in existence. In providing for the financial control of "wholly owned Government Corporations" in the Act of December 6, 1945 (c. 557, 59 Stat. 597), Congress defined that term as including, among other named agencies, "Defense Supplies Corporation" and the other corporations dissolved by the joint resolution enacted in June of the same year. Since DSC obviously, therefore, continued in existence at least for the continuation of this and other pending litigation, the direction of the court below that the judgment rendered in its favor be vacated because of abatement was clearly erroneous.

The opinion of the court below is based largely upon the language in Section 2 of the joint resolution, immediately following the directive against

abatement, which provides as follows: "but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." This provision, together with the language in Section 1 to the effect that all functions of DSC shall be performed by RFC, was thought to make mandatory the substitution of RFC as a condition to continuation of the action and to deprive the court of jurisdiction of the action altogether if substitution was not effected within twelve months. We believe that Section 1 was intended to accomplish the general transfer of functions, without more, and that the quoted language from Section 2 did not compel abatement upon failure to substitute.

There is nothing in the Section 2 language relied upon of a mandatory character. It merely confers discretion upon the courts, on a proper showing, to permit substitution. The translation of this permissive authorization into an inflexible requirement upon penalty of abatement must be predicated upon what is supposed to be the necessary implication of the language rather than upon the express language itself. But it is impossible to reconcile this implication with the contradic-

tory and unqualified express statement that "no suit, action, or other proceeding * * * shall abate." Whatever scope the permissive substitution language may have, it would seem ineffective to erase the unequivocal mandate against abatement. Moreover, in view of the clear evidence that the whole of Section 2 was incorporated in the legislation out of an abundance of caution to preserve liabilities against the dissolved corporations and that it was not a carefully drafted provision with other specific ends, it need not be read with the meticulous concern for harmonizing all its terms which is normally accorded legislative action.

The view that the non-abatement provision is not vitiated by the permissive substitution language was adopted by the Court of Appeals in *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011. In that case, suit was brought against Metals Reserve Company, another of RFC's subsidiary corporations whose existence was terminated by the Joint Resolution of June 30, 1945, to recover damages for the alleged breach of certain sales contracts. Process was served on Metals Reserve Company on March 30, 1945, and an answer filed by it on April 4, 1945. The case was then continued to the June 1947 Term, and on Metals Reserve Company's motion at that time, the district court dismissed the action as abated, no substitution of RFC having been effected

within the twelve-month period provided by the joint resolution. On appeal, however, the Eighth Circuit Court of Appeals held that abatement was precluded by the very language of the resolution but that the provisions with respect to the substitution of RFC established a condition precedent to plaintiff's right to protect his action against that successor corporation, but not to his right to pursue the case against the dissolved subsidiary corporation. Considering it significant that the resolution contains the imperative command that by the dissolution of the corporation no suit 'shall abate,' while the provision with reference to substituting the Reconstruction Finance Corporation * * * is clearly permissive, as indicated by the use of the word 'may'" (166 F. 2d at 1014), the court said:

> * * * the Metals Reserve Company, for the purpose of litigating plaintiff's claim, is still in being. That plaintiff failed to take proceedings for the substitution of the Reconstruction Finance Corporation can in no manner affect the liability of defendant Metals Reserve Company. It can have no concern with the question as to whether plaintiff has preserved his right to seek relief against the Reconstruction Finance Corporation. Certainly, the failure to make such a motion was no ground for dismissing the action as against the defendant Metals Reserve Company * * * (166 F. 2d at 1015).

The Court of Appeals for the Eighth Circuit thus found a meaning for the clause permitting substitution without impairing "the imperative command" against abatement.

Although the Eighth Circuit Court of Appeals found scope for the operation of the substitution language, we believe its background as an amendment to the original RFC draft of the joint resolution would seem to make unnecessary exploration of the circumstances to which it might apply. Whatever its scope, the requirement of a showing of necessity for survival would seem to render it of no possible application to a suit by one of the dissolved corporations to recover money damages for the negligent destruction of government property. As pointed out in the dissent below (R. 420–421), the provision—

> can not rationally be applied to a case like this and was not intended to be. The questions involved in the suit were the familiar ones arising in all cases of like character. They were whether negligence on the part of the defendants had caused or contributed to the property loss sustained by the government, and if so, the amount in money of the recoverable loss. This being an ordinary tort action where the plaintiff's right to damages had vested, the continuing necessity for the determination of the questions at issue would seem to be apparent on the face of the pleading. And, if this were not so, the necessity for their determination

> had already been amply demonstrated in the course of the trial. No additional showing of necessity was possible, and no reason existed for attempting to make one unless, indeed, it were permissible to think that the government no longer needed to be compensated for its loss.

Although denying its applicability to the instant case, the dissenting opinion pointed out that the clause "doubtless has its uses." It observed that the provision "appears to have been lifted from the existing statute having to do with a survival of suits against public officers in relation to the discharge of their official duties." It then went on to suggest that in enacting the provision Congress "would seem to have had in mind the possible existence of special circumstances where a change in conditions, such as the lapse of emergency legislation or the like, might have made decisions of the points at issue of no more than academic interest or rendered futile or inappropriate the grant of the relief sought." (R. 421.)

The suggestion that the substitution provision might impose a requirement in some circumstances and not in others finds support in the decisions. In *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U. S. 828, the court in dealing with a question of substitution under Rule 25 (d) of the Federal Rules of Civil Procedure, held that substitution was required in accordance with terms of the rule only when reliance upon

the rule was necessary to revive an action which otherwise would have abated. It held that compliance with the rule was unnecessary in cases involving public officials which did not abate upon their retirement from office and that the action before the court, one brought by the Price Administrator to recover treble the amount of alleged overcharges in the sale of wrist watches, was such an action. This result was reached although this Court in another type of case involving the Price Administrator had held the rule applicable. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111.

The reasoning of the Court of Appeals would seem equally applicable in the instant case where, for reasons already indicated and others yet to be shown (*infra*, pp. 39–44), it is clear the Government's action would not have abated even without statutory authority to substitute. The conclusion of that court with respect to the purpose of the rule would also apply with equal force in the instant case (165 F. 2d at 337–338):

> We are convinced that Rule 25 (d) of the Federal Rules of Civil Procedure was not promulgated for the purpose of hampering the Government in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government.

Other decisions have similarly held that the effect of a failure to comply with the rule or statute relating to the substitution of public officials depended upon the nature of the action and whether or not it would have abated without the express authorization to substitute. See *Porter* v. *Maule*, 160 F. 2d 4 (C. A. 5); *Thomas B. Bishop Co.* v. *Santa Barbara County*, 96 F. 2d 198 (C. A. 9); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9).

Review of the legislative history of the enactment and an analysis of its terms in the light of existing authorities demonstrate that the court below completely misconceived the effect of the statutory language. The original drafters of the joint resolution contemplated a simple provision to effect a transfer of functions without affecting any substantive rights. Out of an abundance of caution amendments were made to assure that this result would be accomplished. These amendments contain an "imperative command" that actions shall not abate and a further provision authorizing substitution, which the decisions indicate is applicable only in cases in which specific statutory authority to substitute is necessary to maintain the action. Since the present action would not have abated in the absence of authority to substitute, the failure to comply with the conditions for substitution was of no effect and there

was no occasion to vacate the judgment on the merits obtained by DSC.

The decisions of this Court upon which the court below relies—*LeCrone* v. *McAdoo*, 253 U. S. 217; *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590—do not support its ruling. The *Curran* case, which the majority of the Court of Appeals cited as particularly conclusive of the instant case, was concerned with the Act of February 13, 1925 (c. 229, 43 Stat. 936, 941), which provided, in pertinent part, that pending cases against an officer of the United States who died or resigned might be permitted to be continued against his successor in office "if within six months after his death or separation * * * it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. The 1925 statute, however, lacked the clear declaration, present in the Joint Resolution of June 30, 1945, that pending litigation should not abate. And the survival of pending litigation was there specifically made conditional on timely substitution, whereas, in the 1945 resolution, no language appears importing such a condition to survival. In *LeCrone* v. *McAdoo*, 253 U. S. 217, and *Payne* v. *Industrial Board of Illinois*, 258 U. S. 613, which dealt with the 1899 predecessor to the 1925 Act (Act of February 8, 1899, c. 121, 30 Stat. 822), a statute much more like the 1945

resolution in language, though the writs of error were dismissed, the judgments below were not disturbed; thus, the failure to effect an appropriate substitution was deemed only to have deprived this Court of authority to review the decisions of the lower courts, but not to have required the abrogation of those judgments and the dismissal of the actions, as in the Claussen case, where the 1925 statute was controlling.

The *Claussen, LeCrone,* and *Payne* cases are not in point for the further reason that the 1889 and 1925 Acts, with which they were concerned, were radically different in genesis and design from the June 30, 1945 resolution. Those two Acts were general statutes intended to afford relief from the common-law rule that *personal* actions by or against public officers abated upon their death or separation from office. See *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600; *Irwin* v. *Wright,* 258 U. S. 219. The *Claussen, LeCrone,* and *Payne* cases were all such personal suits. An action at common law involving a continuing duty of the public office, rather than the personal performance of the individual officer, did not, however, abate upon his separation from office. *Thompson* v. *United States,* 103 U. S. 480; *Marshall* v. *Dye,* 231 U. S. 250; *Bowden* v. *Johnson,* 107 U. S. 251, 264; *Murphy* v. *Utter,* 186 U. S. 95; *People ex rel. Chicotte* v. *Best,* 187 N. Y. 1; *Weadon* v. *Shahen,* 50 Cal. App. 2d 254;

cf. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533. Thus, such actions presented no problem of abatement, no relief was needed in such cases, the 1899 and 1925 statutes were not intended to apply to them, and certainly they were not meant to abate them. Cf., *e. g.*, *Murphy* v. *Utter*, 186 U. S. 95 with *Ex parte La Prade*, 289 U. S. 444, 456–457. The instant suit clearly is one of this latter type of action; it was instituted in a representative capacity; it is in no sense a personal suit. See *United States* v. *Summerlin*, 310 U. S. 414, 416; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249–250. The construction which the courts have afforded to the 1899 and 1925 Acts is, therefore, wholly irrelevant to the case in hand, particularly in light of the express provision in the Joint Resolution of June 30, 1945, against abatement. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 337–338 (C. A. 8), certiorari denied, 334 U. S. 828.

II

APPLICATION OF SUBSTITUTION CLAUSE IN INSTANT CASE DID NOT REQUIRE JUDGMENT TO BE VACATED

Even if it be assumed that the provision permitting substitution of RFC, upon a proper showing, within twelve months, was applicable to the present action and was intended to terminate the authority of the dissolved corporations to continue litigation if not complied with, the judgment awarded DSC should not have been

vacated. The judgment was rendered by the district court when DSC was still alive and should be upheld as valid notwithstanding the subsequent expiration of powers. Furthermore, the United States at all times was the real plaintiff in the action. The corporations through which the United States acted were merely agencies of the Government. The substitution of parties was therefore a formal matter of the most technical character and the failure to comply with the substitution provisions was a defect of form which should not have stood in the way of an adjudication on the merits.

A. TERMINATION OF ALL POWERS OF DSC DID NOT RENDER PRIOR JUDGMENT VOID

It has been shown that the case had been fully tried and argued before the enactment of the joint resolution providing for the dissolution of DSC. Moreover, the judgment in favor of DSC was awarded long before the twelve month period for substitution had expired. In view of the explicit mandate against abatement, it seems clear that the corporation survived for litigation purposes at least for the twelve months in which substitution was authorized. As previously pointed out, Congress named DSC as an existing Government Corporation several months after the enactment of the joint resolution which purported to dissolve it. This judgment was rendered by the district court when there can be no question that DSC

was still alive and, therefore, no question of its validity at the time of entry. We believe the decisions of this Court establish that a judgment valid when rendered is not rendered void by the subsequent dissolution of the corporation. In the comparable situation of the death of a party to an action, it has been held that a court had the power to *enter* judgment in favor of the plaintiff after the plaintiff died where the case had been tried and submitted before his death. *Mitchell* v. *Overman*, 103 U. S. 62. And in the recent case of *Walling* v. *Reuter Co.*, 321 U. S. 671, it was held that the dissolution of a corporation pending review by this Court on certiorari would not be permitted to interfere with the judgment rendered by the district court.

In the *Reuter* case the effect of dissolution under Louisiana law was to destroy all capacity to be sued. The Court pointed out that where for any reason it lacks power to proceed with an appeal, "it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." It stated that "the judgment of the District Court was entered against respondent before it was dissolved and while it was capable of being sued" and that "it was binding on respondent" and others who might be brought within its reach. The Court concluded that "it does not follow, because the pending appellate proceeding has abated,

that the judgment of the District Court has abated because of respondent's dissolution. Nor does it follow, because of this Court's inability to proceed with the appeal on the merits for want of a proper party respondent, that petitioner is to be deprived of the benefit of his judgment in the District Court, which the statute contemplates shall be undisturbed save only by pursuit to completion of the prescribed appellate procedure." 321 U. S. at 676.

In the *Reuter* situation, the effect of the holding is that the district court judgment had sufficient vitality to be reinstated after having been reversed by the court of appeals. Frustration of full review by dissolution, the Court said, "cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court." The Court concluded "that in the circumstances the only just and appropriate disposition which can be made of this case is that the judgment of the Court of Appeals be vacated, and the judgment of the District Court restored, as though respondent had taken no appeal." 321 U. S. at 677–678. We submit that if it was proper to reinstate a district court judgment that was *reversed* on appeal, after dissolution of a corporation without surviving powers, there was no requirement in the instant case, as the court below seems to have believed, that the judgment *affirmed* on appeal be vacated. See, also, *Pendle-*

ton v. *Russell*, 144 U. S. 640, 646; *Coughlin* v. *District of Columbia*, 106 U. S. 7; Note, 62 A. L. R. 1048.

The error of the holding that the termination of DSC's powers required the judgment rendered during its existence to be vacated is further demonstrated by the various decisions which avoid the effect of death or dissolution of parties by the entry of judgments *nunc pro tunc* as of a date prior to the death or dissolution. *Mitchell* v. *Overman*, 103 U. S. 62; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *City of New Orleans* v. *Warner*, 176 U. S. 92; *Bell* v. *Bell*, 181 U. S. 175; *Shakman* v. *United States Credit System Co.*, 92 Wisc. 366; *Florida Development Co.* v. *Polk County National Bank*, 76 Fla. 629; Notes, 3 A. L. R. 1403, 68 A. L. R. 265. This device has been employed where the death occurred at different stages of the proceeding. In *Mitchell* v. *Overman*, 103 U. S. 62, for example, a *nunc pro tunc* judgment was upheld although the plaintiff died before the actual decision in the trial court but after trial and submission of the case, and in *Bell* v. *Bell*, 181 U. S. 175, judgment was entered *nunc pro tunc* by this Court where the plaintiff in error died after argument but before decision.

Evidence that no jurisdictional barrier is presented by the failure to make timely substitution or by the dissolution of a corporate party is also furnished by the decisions which indicate that the

plea in abatement may be waived if not promptly presented. See *United States* v. *Smith*, 289 U. S. 422, 426; *Trounstine* v. *Bauer, Pogue & Co.*, 144 F. 2d 379 (C. A. 2), certiorari denied 323 U. S. 777; *Matthison* v. *Payne*, 98 N. J. L. 383, affirmed, 99 N. J. L. 285. The lapse of thirty-one months in the instant case between the time substitution was possible and the time the question of substitution was first raised by respondents would seem to make this a proper case for application of the waiver principle. But whether or not the circumstances are deemed to constitute a waiver, it is clear that the subsequent dissolution of DSC did not render the prior judgment invalid.

B. THE FACT THAT THE UNITED STATES WAS THE REAL PLAINTIFF IN THE ACTION RENDERS THE FAILURE TO SUBSTITUTE AN INCONSEQUENTIAL DEFECT IN FORM

The fact that the United States has chosen the corporate form to carry out its government functions has been held by this Court on numerous occasions not to alter the essential fact that the corporation is still acting for and on behalf of the United States. Accordingly, in many instances government corporations have been treated as the United States. The right to plead a counterclaim granted to "the Government of the United States," for example, has been held applicable to a claim of RFC. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536. The power of a national bank to pledge assets to secure the deposit of pub-

lic money has been held to extend to wholly owned government corporations. *Inland Waterways Corp.* v. *United States*, 309 U. S. 517. See also, *Clallam County* v. *United States*, 263 U. S. 341; *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415; *Federal Crop Ins. Co.* v. *Merrill*, 332 U. S. 380, 384.

There can be little question that in this case the United States was the real party plaintiff. As alleged in the complaint (R. 4) and found by the district court (R. 78), the entire capital stock of DSC was owned by the United States, and the corporation was no more than "an agency, arm and instrumentality of the United States" engaged solely in carrying out governmental purposes. As stated by its charter, DSC was an instrumentality of the United States Government created "in order to aid the Government of the United States in its national-defense program." *Southern Pacific Co.* v. *RFC*, 161 F. 2d 56, 58 (C. A. 9). Thus, the corporate cloak cannot disguise the plain fact that in this case the United States was the true party in interest acting purely for governmental purposes and on behalf of the United States. See also notes 1 and 2, *supra*.

Property of DSC has been held to be property of the United States. *Southern Pac. Co.* v. *Reconstruction Finance Corp.*, *supra*. An action brought by DSC has been held to be "nothing more than an action by the United States." *De-*

fense Supplies Corp. v. *United States Lines Co.*, 148 F. 2d 311, 312 (C. A. 2), certiorari denied, 326 U. S. 746. Many cases have held that the United States may be the plaintiff in actions based upon contracts of government corporations. *Russell Wheel & Foundry Co.* v. *United States*, 31 F. 2d 826 (C. A. 6); *United States* v. *Skinner & Eddy Corporation*, 35 F. 2d 889 (C. A. 9), petition for certiorari dismissed, 281 U. S. 770; *United States* v. *Czarnikow-Rionda Co.*, 40 F. 2d 214 (C. A. 2), certiorari denied, 282 U. S. 844; *Reconstruction Finance Corporation* v. *Krauss*, 12 F. Supp. 44 (D. N. J.); *Reconstruction Finance Corporation* v. *Graydon*, 16 F. Supp. 765 (E. D. S. C.); *United States* v. *Freeman*, 21 F. Supp. 593 (D. Mass.); *United States* v. *Arthur*, 23 F. Supp. 537 (S. D. N. Y.).

Since the action here instituted by DSC was actually one on behalf of the United States, it survived the dissolution of DSC, and a formal substitution of the United States, the real party in interest, or its new agent, RFC, in place of DSC, would have constituted "nothing more than a formal amendment to the title of the action to conform it to the truth." *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied, 334 U. S. 828. See, also, *Porter* v. *Maule*, 160 F. 2d 1 (C. A. 5); *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); cf. *American Transp. Co.* v.

Swift & Co., 24 F. 2d 310 (C. A. 2); *Atkins* v. *W. A. Harriman & Co., Inc.*, 69 F. 2d 66 (C. A. 2); *Reardon* v. *Balaklala Consol. Copper Co.*, 193 Fed. 189 (N. D. Cal.); *Ingraham* v. *Terry*, 11 Humph. (Tenn.) 572. Consequently, this suit should either have been deemed continued by the United States in the name of the original nominal plaintiff without substitution (cf. *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.)); the United States should have been substituted as plaintiff (cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9)); or the successor agent, RFC, should have been substituted (cf. *United States* v. *Saunders Petroleum Co., Inc.*, 7 F. R. D. 608 (W. D. Mo.)).[3]

As a defect in form consisting of the failure to substitute one nominal plaintiff for another, the omission would not justify the abatement of the action. To permit abatement in these circumstances would be contrary to the express direction of R. S. 954 (28 U. S. C. (1946 ed.) 777) that "No * * * judgment * * * in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or

[3] See also Rule 25 (c) which provides that in case of any transfer of interest the action may be continued by or against the original party. Compare 28 U. S. C. 2404 to the effect that no civil action for damages brought by or on behalf of the United States or in which it is interested shall abate on the death of a defendant.

want of form."[4] Cf. *Bowden* v. *Johnson*, 107 U. S. 251. Although R. S. 954 was repealed effective September 1, 1948, by Section 39 of the Act of June 25, 1948 (Pub. Law 773, 80th Cong., 2d sess.), it does not appear that its repeal affects the instant case since that section also provides that "Any rights or liabilities now existing under such [repealed] sections or parts thereof shall not be affected by this repeal." Thus, R. S. 954 would still seem to be applicable to the judgment in this case which was entered on April 6, 1948 (R. 426–427). Moreover, it is stated expressly in the legislative history of the repealing act that the reason for repealing R. S. 954 was that the subject matter thereof was "Covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure" (see H. Rep. 308, 80th Cong.,

[4] The entire section reads as follows:

SEC. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

1st sess., p. A239).[5] Under "the mandate of that statute" it was the duty of the court below "to disregard niceties of form and to give judgment as the right of the cause shall appear to it." *Hoiness* v. *United States*, 335 U. S. 297, 300–301. The affirmance of the district court's judgment in favor of DSC by the court below before its attention was called to the omission to substitute clearly indicates its views as to "the right of the cause" in the absence of deficiencies of form.

---

[5] Rule 61 provides as follows:

Rule 61. HARMLESS ERROR. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be reversed and that the judgment of the district court be reinstated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 298

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,

Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, and CLYDE W. HENRY,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Foreword.

While Capitol Chevrolet Company are each filing separate documents of opposition each incorporates the other by reference as though fully set out herein, in order to avoid duplication.

Comes now Capitol Chevrolet Company, one of respondents herein, and opposes the Petition of the Solicitor General on behalf of the defunct Defense Supplies Corporation and Reconstruction Finance Corporation for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals entered on April 6, 1948, as amended May 13, 1948.

Opinions Below.

The decision and order attempted to be reviewed herein are reported in 168 F. 2d 199. Prior decisions which are vacated by the present decision are reported in 164 F. 2d 773 and 67 Fed. Supp. 16, respectively. The decision of the Ninth Circuit Court of Appeals is reported in the record, pages 396 to 495. Prior opinions are contained in the record, pages 370 to 380 and pages 63 to 75, respectively.

Jurisdiction.

This court is without jurisdiction to entertain the petition.

The alleged petitioner Defense Supplies Corporation is a non-existent corporation and has been by resolution ever since July 1st, 1945, when Congress abolished the same, pursuant to Chapter 215 Public Law 109, 59 Stat. 310, Act of June 30, 1945. The present Reconstruction Finance Corporation was organized June 30, 1947, as amended by the 80th Congress, Public Law 548, Ch. 334, 2nd Session and never has been a party to the action, nor has Congress authorized the present RFC to take over the lawsuits of the prior corporation.

No judgment had been entered in any court prior to the dissolution of the Defense Supplies Corporation by the Act of June 30, 1945. When the trial court attempted to enter judgment there was no corporation then in existence, nor did the attorneys representing the Defense Supplies Corporation have a right to appear for it and to have judg-

ment entered for the said defunct corporation, nor did the trial judge have that right or authority.

No motion was made to substitute the Reconstruction Finance Corporation for it within the period authorized by Congress, nor was there any showing of any kind made at any time to any court on any supplemental motion showing the necessity therefor as required by the Act of Congress.

When the appeal was carried on it was carried on for a dead corporation by attorneys who knew it was dead, and no effort was made to substitute any other corporation, in the mode and manner required by the Congress.

Reconstruction Finance Corporation is without power to appear in the action as it has never been substituted into the case as a party, and no motion has ever been granted by which it is substituted in as a party. Furthermore, the jurisdiction and authority of the Reconstruction Finance Corporation itself lapsed as the powers and duration of the corporation as it existed at the time of the dissolution of the Defense Supplies Corporation lapsed and a new Act was passed by Congress June 30, 1947, known as Reconstruction Finance Corporation Act (June 30, 1947, C. 1, 166 Title 1, Sec. 61 Stat.). No jurisdiction is contained in the new Act for the continuation of any litigation of any corporation or other body taken over under the old act, or for counsel to appear for it or against it. This was solely within the discretion of Congress.

Title 15, Sec. 631 U. S. Code, provides as follows:

"Exercise of powers conferred under prior law. The corporation is authorized to exercise the functions, powers, duties, and authority transferred to the

corporation by Public Law 109, 79th Congress, approved June 30, 1945, (Sec. 1618, 1619 of this Title), but only with respect to programs, projects, or commitments outstanding on June 30, 1947. Sections 618 and 619 relate to purchase and resale of surplus property and limitation on use of corporate funds."

Nothing in the Act referred to any suits or court action or any other litigation except Section 643 which relates to RFC Mortgage Co.

Section 2105 of the New Federal Judicial Code provides as follows:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon *matters in abatement* which do not involve jurisdiction."

The decree of the Circuit Court of Appeals merely vacated a void judgment in favor of a defunct corporation which was non-existent at the time of the conclusion of the action, and which was terminated by the specific direction of the language of the Act of Congress.

The decree of the Ninth Circuit Court of Appeals, from which this appeal is attempted, was entered April 6, 1948 [R. 426, 427]. A petition for rehearing was attempted to be filed by the alleged attorneys for the then defunct corporation and was denied by the Circuit Court of Appeals May 13, 1948 [R. 428].

Since the corporation was defunct, its attorneys had no jurisdiction to appear in its behalf for it and therefore

the petition, which its denominated a petition for rehearing, was void for lack of jurisdiction of the parties or subject matter or representation by any counsel and the time could not be extended by such attempted petition for rehearing by the appearance of a non-existing corporation, by attorneys unauthorized by the corporation to appear for it. Therefore, the time within which petition for review could be asked in this court lapsed in July of 1948 and could not be, and was not, extended by the alleged petition for rehearing which itself was a nullity under the circumstances.

On August 12, 1948, the time to Petition for Certiorari was extended to October 1, 1948, by the Chief Justice. This was four months and six days after the original decree and 92 days after the order denying rehearing. Section 2101, Federal Judicial Code, subdivision (c) provides that any appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days. There is therefore a want of jurisdiction of both the corporation and the subject matter thereof and want of jurisdiction on the part of the Solicitor General to appear for the said defunct corporation, or a corporation that has never been a party to this action in the courts below. The petition is therefore a nullity.

Brief Statement of Facts.

Defense Supplies Corporation brought an action against appellant on February 16, 1944, alleging its authority pursuant to an Act of Congress [R. 4] in its right to sue and be sued pursuant to said Act of Congress [R. 4]. However, private attorneys appeared for the corporation, to wit, the law firm of Meyer, Brobeck, Phleger & Harrison of San Francisco [R. 10].

No judgment was entered in the District Court prior to the destruction of the corporation by Congress but the admitted facts show that the Defense Supplies Corporation ceased to exist on July 1, 1945, by virtue of an Act of Congress, June 30, 1945, dissolving that corporation. (Joint resolution of Congress June 30, 1945, c. 215, 59 Stat. 310.)

After the Defense Supplies Corporation ceased to exist, the trial of the case in the District Court, on which the subsequent judgment was first entered, was continued by the filing on July 2, 1945, of a closing brief in the name of the defunct corporation. The attorneys for the defunct corporation admitted in the Circuit Court of Appeals that they knew that the corporation became defunct but did not notify the court, or take any steps to substitute the party. The District Court ordered the case submitted on July 16, 1945 and thereafter, on April 15, 1946, still without any notification by the attorneys for the defunct corporation, the trial court thereafter entered judgment for the non-existent corporation against certain defendants and against the corporation as to one defendant. The defunct corporation purported to appeal to the Circuit Court of Appeals and the appellants herein, the appellants in the Circuit Court, appealed to the Circuit Court, still without

any notification to the Circuit Court by the attorneys for the defunct corporation that it had been dissolved by an Act of Congress.

On September 16, 1946, over a year after its dissolution, the defunct corporation filed, in the Circuit Court of Appeals, its points and authorities on the purported appeal and briefed and argued it, still without notifying the court, and the appellants did likewise. Thereafter the Circuit Court affirmed the judgment in favor of the defunct and non-existent corporation.

All of the judges and their law clerks and all of the parties (except the attorneys for the defunct corporation) were ignorant of the fact that there was a Congressional enactment dissolving the Defense Supplies Corporation on June 30, 1945.

As stated by the Circuit Court of Appeals:

> "As for the attorneys for the defunct corporation, they frankly admit they were aware that they purported to act for the defunct corporation." [R. 398.]

Statutes Involved.

(1) The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, as follows:

> "That, notwithstanding any other provision of law, all functions, powers, duties and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Re-

construction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which the joint resolution applies.

"Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

"Sec. 3. This joint resolution shall take effect on July 1, 1945."

(2) The Reconstruction Finance Corporation Act of 1932, Title 15, Act of January 22, 1932, c. 8, Sec. 1, 47 Stat. 5, repealed by Act of June 30, 1947, c. 166, Title 2, Sec. 206(m).

After the Circuit Court of Appeals had entered a judgment that was void for want of jurisdiction of the parties or the subject matter, the appellants herein, on preparation of the record for certiorari to this Court, discovered

that the Circuit Court of Appeals judgment was entirely void for want of jurisdiction as the Defense Supplies Corporation, for which the attorneys were purportedly acting, had been dissolved by Act of Congress and no longer had any power either to employ counsel, have counsel present, or to be represented in court, and that the purported judgment was for the same reason null and void.

There was no Party Plaintiff. At the time of judgment the plaintiff corporation had been dissolved and the provisions of the Act of Congress, requiring that a motion for supplemental petition be filed within twelve months after the date of the statute, showing a necessity for the survival of such action, had not been complied with. [R. 386, 387, 388.]

After two years and four months attorneys for the non-existent corporations for the first time moved to amend its pleading to substitute the Reconstruction Finance Corporation in place of the Defense Supplies Corporation "as a mere defect of form" [R. 393]. No other ground was set forth in its motion [R. 392, 393]. Their motion to amend was denied.

The Circuit Court granted the appellants' motion to vacate the judgment and dismiss the proceeding as noncompliant with the mandates of Congress. This was in accord with the decisions of this Honorable Court. (*LeCroine v. McAdoo*, 253 U. S. 217, 219; *United States of America Ex Rel. Niels Claussen v. Curran, Commission*, 276 U. S. 590, 72 L. Ed. 720; *Anderson v. Yungkau*, 329 U. S. 482).

Oklahoma Natural Gas Company v. Oklahoma, 273 U. S. 257.

There is, therefore, no conflict in the lower court's decision and those of this Court.

Reasons for Denying the Writ or Affirming the Judgment of the Circuit Court Below.

I.

At the outset, it must be asserted that there are no parties plaintiff before this Court.

The Defense Supplies Corporation was abolished by Act of Congress on June 30, 1945, c. 215, Public Law 109, 59 Stats. 310. The Reconstruction Finance Corporation has never become a party to the action. This Court, then, is without jurisdiction to grant the writ.

No more sanctity is given to the petition by reason of its having been filed by the Solicitor General than if it had been filed by the previous private attorneys allegedly representing the defunct corporation.

Furthermore, the Reconstruction Finance Corporation had a limited life, which terminated prior to the new act establishing a Reconstruction Finance Corporation on June 30, 1947. This new corporation did not take over the debts or liabilities, or the assets of the Defense Supplies Corporation, or the lawsuits of the Reconstruction Finance Corporation.

This Court always looks into its own jurisdiction before acting.

Jurisdiction cannot be conferred by consent.

Mitchell v. Maurer, 293 U. S. 237, 244;

City of Gainsville v. Brown Crummer Co., 277 U. S. 54, 59;

Ross v. White, 32 F. 2d 750.

Filing a petition in this court does not create jurisdiction. This requires no citation and authorities.

Since the Defense Supplies Corporation is non-existent and the Reconstruction Finance Corporation is not a party in the action, the petition for the writ should be dismissed for want of jurisdiction.

It is axiomatic, also, that the mode of procedure specified by the Act of Congress is the measure of power of the courts in these matters. Congress specified both the mode and the measure of power, as follows:

> "That no suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation."

Thus, Congress has specifically limited the manner and time within which a motion or supplemental petition may be filed, to-wit: (1) Within twelve months after the effective date of the enactment, to-wit, within 12 months after July 1, 1945; (2) Showing a necessity for the survival of such suit, action, or other proceeding; (3) Requiring the court, upon such petition within such time and such showing, if the court is satisfied that a satisfactory showing has been made, to allow the same to be main-

tained by or against the Reconstruction Finance Corporation (not the United States of America).

It is thus apparent that Congress put in a provision or Statute in repose to abate proceedings and to require timely action, either by or against the corporation, and to end suits which may effect the Defense Supplies Corporation within twelve months after July 1, 1945. These provisions were known to the counsel for the defendant corporation. They did not comply with these statutory and mandatory requirements.

Furthermore, the Reconstruction Finance Corporation, as organized in 1932, and under which the Defense-Supply Corporation was founded, lapsed by reason of the terms of its creation in 1947. It was superseded by a new corporation with an entire new Act of Congress, with no provision remaining for or against the old corporation.

It is for Congress to express the policy and jurisdiction of the courts—and, it is axiomatic that Congress may grant or withdraw jurisdiction from the courts, or provide the manner in which the courts have jurisdiction, and the extent to which they have jurisdiction.

Yakus v. United States, 320 U. S. 730, 88 L. Ed. 431;

Willingham v. Bowles, 321 U. S. 503, 88 L. Ed. 892.

The New Federal Judicial Code also provides:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

Section 2105, New Federal Judicial Code.

There is no conflict between the decision of the Circuit Court of Appeals and this court. The decision of the Circuit Court is in accord with the previous decisions of this court, holding that the mandates of Congress must be fulfilled or the case must lapse.

This court so held in the case of *LaCrone v. McAdoo*, 253 U. S. 217, *Payne v. Industrial Board of Illinois*, 258 U. S. 618, and *United States Ex Rel. Claussen v. Curran*, 276 U. S. 590, and in *Anderson v. Yungkau*, 329 U. S. 482.

Congress has copied into the present statute the same provisions that were in the Act of Congress of February 9, 1889, which were interpreted in the case of *LaCrone v. McAdoo*, 253 U. S. 217, 219, wherein this court dismissed that action for want of jurisdiction. The time provisions of the New Federal Rules, Rule 25(c), which are, of course, superseded by the specific Act of Congress, nevertheless provides for a strict time interpretation and were so held by this court in *Anderson v. Yungkau*, 329 U. S. 482.

The Reconstruction Finance Corporation Act of June 30, 1947, adopted on June 30, 1947, ch. 166, Title 1, Sec. 13, 61 Stat., has only one provision for the transfer of assets and liabilities and for the continuation of lawsuits and that is with reference to the R. F. C. Mortgage Company, a corporation organized under the laws of the State

of Maryland, owned and held by the Reconstruction Finance Corporation. The Act supersedes and repeals all previous acts, with no provision whatsoever for the continuation of any obligation of the previous Act.

Contrary to the contentions of the Solicitor General (quoting from Judge Healy) it would be an unconscionable result for this court to assume jurisdiction in the case where Congress has deprived it of jurisdiction and an unconscionable thing to permit counsel for a defunct Government Corporation to continue litigation for two years and four months, for a company that was non-existent and which it knew was non-existent, without taking the mandatory steps which Congress has decreed would be necessary. Congress, not the court, is the determiner of the mode and manner of jurisdiction and the expiration thereof.

No construction is therefore necessary of the joint resolution of June 30, 1945, as it has been fully and correctly construed by the Ninth Circuit Court of Appeals, and no important question is present, nor is there any jurisdiction to proceed further in the matter.

The decision of the Eighth Circuit Court of Appeals, while against the Government, shows the danger of the decision sought for by the attorneys for the defunct corporation.

What is sauce for the goose is sauce for the gander and could well open up many cases which have now been terminated by the specific Act of Congress and apparently meant to be so, and the interpretation placed upon this case by the Ninth Circuit Court of Appeals correctly interprets the law in accord with the decisions of this court.

The Government argues that the Reconstruction Finance Corporation is really the United States and that the United

States is the real party in interest. However, Government corporations, when they act in private capacities, are considered in the same light as private corporations and they garner no additional right because they are formed as government corporations. The duration and powers of the corporation are set up in the Act of Congress creating it and permitting it to sue and be sued, and creating a Board of Directors and similar rights and duties as any private corporation. One could not sue the United States for something growing out of acts of the Defense Supplies Corporation or the Reconstruction Finance Corporation.

Equity rules which the Solicitor General urges upon this court cannot take the place of the laws of Congress nor of the lack of jurisdiction of this court. This action was an action at law. Statutes of limitation have always been deemed necessary and wise. The law gave a reasonable time to substitute under conditions therein set out, twelve months, under rule 25, Rules of Civil Procedure, only 6 months is allowed. In O.P.A. cases only two months was permitted to seek a review and this was upheld as fulfilling reasonableness and due process. *Yakus v. U. S.*, and *Willingham v. U. S.* (*supra*). Congress has expressed the legal rights and duties and declared what is equitable. This court would have no power to order any judgment to be entered *nunc pro tunc*. Its public interest requires that private litigants dealing with a corporation such as Defense Supplies or R.F.C. be dealt with and treated the same as any private corporation.

The assertion, by the Solicitor General, unsupported by any facts in the record, that there was a body of litigation pending on July 1, 1945, by and against the corporations named in the Joint Resolution of June 30, 1945, and

that this decision of the Ninth Circuit Court may be a basis to have the judgments below vacated, could not be applicable now in view of the Act of Congress of June 25, 1948, providing that "there shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement." (Sec. 2105, New Federal Judicial Code.)

Furthermore, if the decision of the Ninth Circuit Court is not to stand any litigant could come in now and seek rights against the Reconstruction Finance Corporation which they have thought terminated by reason of the Act of Congress requiring substitution of parties within twelve months where the action is terminated.

The statement of the Ninth Circuit Court regarding the case of *Fix v. Philadelphia Barge Co.*, 290 U. S. 530, answers the petitioner's assertion that the United States is the real party in interest and therefore the substitution may be ordered. In the *Fix* case, the court says:

> "Answers the contention much urged, that the United States owning the stock of Defense Supplies Corporation is the real party in interest in a recovery of damages against appellants. In that sense so was the United States, with its Collector Fix suing for taxes for the Federal Treasury in his 'official capacity' as tax collector."

See also:

Reconstruction Finance Corp. v. Jr. Member Corp., 312 U. S. 81, 85 L. Ed. 595.

The Defense Supplies Corporation and the Reconstruction Finance Corporation were organized by Congress, to be treated like any other private corporation.

The Capitol Chevrolet Company incorporates by reference as part of this opposition all matters set out by Lawrence Warehouse Company in its opposition.

The Ninth Circuit Court Opinion is an able decision by Judge Denman, concurred in by the learned Judge Homer Bone, himself a former Senator of the United States, with a keen understanding of congressional powers.

WHEREFORE, Capitol Chevrolet Company prays that this Honorable Court dismiss the Petition for the Writ for want of jurisdiction (a) of the parties, (b) of the subject matter, (c) because it is in accordance with previous rendered decisions of this honorable court, (d) because the scope of review is forbidden by the Judicial Code, Section 2105; or affirm the judgment below on the basis of the cases heretofore decided by this Honorable Court.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Capitol Chevrolet Company.

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OF THE

United States

OCTOBER TERM, 1948

298

No. 298

DEFENSE SUPPLIES CORPORATION, and RECONSTRUCTION FINANCE CORPORATION,

Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, and CLYDE W. HENRY,

Respondents.

BRIEF FOR RESPONDENT, LAWRENCE WAREHOUSE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENT, LAWRENCE WAREHOUSE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The original action was brought by petitioner, Defense Supplies Corporation, a corporation created by and organized under an Act of Congress, against respondents for the alleged negligent destruction of

property by fire. The complaint was filed February 16, 1944, and the submission of evidence concluded on February 15, 1945. On July 1, 1945 Defense Supplies Corporation was dissolved by Congress by the Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310). Thereafter counsel appearing in the name of Defense Supplies Corporation, without apprising Court or counsel of the dissolution, filed a brief in the trial Court, and the matter was ordered submitted on July 16, 1945. On January 9, 1946 the trial Court ordered judgment for plaintiff, and counsel appearing in the name of Defense Supplies Corporation prepared findings and argued upon settlement thereof. On April 15, 1946, judgment was entered and after respondents' motion for a new trial was denied, respondents appealed. Additionally, counsel appearing in the name of Defense Supplies Corporation appealed against the judgment in favor of respondent Henry. The appeals were briefed and argued in the Court of Appeals for the Ninth Circuit, which affirmed the judgment on December 5, 1947, and denied petitions for rehearing on January 2, 1948.

During the period after July 1, 1945, counsel appearing in the name of Defense Supplies Corporation continued to act for the dissolved and non-existent corporation without ever advising the Court or counsel of that fact, of which they were admittedly aware. (R. p. 398.) On February 17, 1948, respondents Lawrence Warehouse Company and Capitol Chevrolet Company, for the first time discovering the fact of dissolution of the corporate plaintiff, filed their mo-

tion in the Court of Appeals for the Ninth Circuit to vacate its decision, reconsider the matter and remand it to the District Court with instructions to dismiss the action as abated. (R. pp. 386-389.) This motion was argued and submitted on memorandums on February 24, 1948. (R. p. 390.)

Thereafter, on March 2, 1948, a motion was filed in the name of Defense Supplies Corporation and Reconstruction Finance Corporation for an order amending the pleadings by substituting Reconstruction Finance Corporation as plaintiff. (R. pp. 392-393.) This motion was ordered submitted on March 8, 1948 (R. p. 394), and on April 6, 1948, the Court of Appeals denied the motion for an order amending the pleadings and granted respondents' motion, vacating the decision and remanding the case to the District Court for dismissal as abated. (R. pp. 395-427.) Petitions for rehearing were denied on May 13, 1948, and the opinion amended. (R. p. 428.)

It is to be noted that petitioner Defense Supplies Corporation has had no existence since July 1, 1945, and that petitioner Reconstruction Finance Corporation is not now, and never has been, a party to the action, and has never moved for substitution or intervention therein, except in the motion "to amend the pleadings" which was denied on April 6, 1948.

JURISDICTION.

Respondent, Capitol Chevrolet Company, is filing a companion brief in opposition to the petition for writ of certiorari herein. While we rely on all matters therein contained, we specifically adopt and incorporate by reference the arguments therein contained to the effect that there is no jurisdiction in this Court to grant the petition for writ of certiorari.

THE GROUNDS STATED BY PETITIONER FOR GRANTING THE WRIT.

The grounds stated by petitioners as reasons for granting the present petition for a writ of certiorari seem to be three in number: first, that the decision of the United States Court of Appeals for the Ninth Circuit in the present case is erroneous; second, that that decision is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Gaynor v. Metals Reserve Co.*, 166 Fed. (2d) 1011 (8th C.C.A., 1948); and third, that a decision by this Court is of importance to the United States because of the possibility of similar litigation.

We propose to discuss these three grounds separately and to show that neither singly nor together do they constitute a valid reason for this Court to exercise its discretion by granting the petition for a writ of certiorari here. Furthermore, as set forth at length in the brief of respondent Capitol Chevrolet Company, there is a complete and total lack of jurisdiction to entertain or grant the petition for writ of certiorari.

THE DECISION BELOW WAS CORRECT.

Petitioners argue at some length that the decision below was erroneous, urging (Petition pp. 7-8) eleven separate specifications of error. We do not propose herein to answer these specifications at length or in detail. Not only does the majority opinion of the Court of Appeals answer them adequately, but a mere allegation of error in the decision of a Court of Appeals has never in itself been a ground for the issuance of a writ of certiorari by this Court. It is fundamental that the jurisdiction of this Court to review a judgment of a Court of Appeals by certiorari is a jurisdiction to be exercised entirely in the discretion of the Court, sparingly, and only in extraordinary cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Mere allegations of error alone are not themselves a proper ground. We will, however, discuss briefly the entire correctness of the decision below.

It is undisputed that Defense Supplies Corporation was dissolved by the Joint Resolution of June 30, 1945, and that no action was ever taken to substitute Reconstruction Finance Corporation as a party within the twelve-month period limited in the Joint Resolution. The sole question involved is as to the effect upon the then pending action of that dissolution of the corporate plaintiff.

The dissolution of a corporation abates a pending action to which it is a party, in the absence of a statute providing authority for the survival of the action. This basic rule is so well established that not

even petitioners controvert it. It is fully discussed in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634 (1927), where Mr. Chief Justice Taft sets out the rule with great clarity. In *National Bank v. Colby*, 21 Wall. (88 U. S.) 609, 22 L. Ed. 687 (1874), this Court, in referring to the pendency of a suit against a dissolved corporation, stated that: "The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation." (In that case, oddly enough cited by petitioners (Petition p. 15), the Court found no such provision in the National Bank Act under which the bank was formed, and abated the action.)

It being clear that the dissolution of a corporation abates a pending action to which it is a party unless there is statutory authority for the survival of the action, and the dissolution of Defense Supplies Corporation being undisputed, the only remaining inquiry is as to the existence of any statutory authority for the survival of the action. The dissolution of the Defense Supplies Corporation was effected by the Joint Resolution of June 30, 1945. It is not even suggested by petitioners that there is any other statute which might authorize survival of the present action, and it is to the Joint Resolution of June 30, 1945 and to that legislative enactment alone to which we must look.

The Joint Resolution is as follows:

> "That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are

hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945."

The Court of Appeals for the Ninth Circuit properly held that this Joint Resolution did not constitute statutory authority for the survival of the present action, in the absence of a timely motion for substitution under the terms of the Joint Resolution. Not only is this conclusion the only proper one under the terms of the resolution, but it is reinforced by many decisions of this Court and of the lower Federal Courts. It is to be noted that while this Court has never passed upon the joint resolution in question, this is not a question of first impression here, as this Court has passed upon a statute *in pari materia*, the Act of Congress of February 9, 1889, both in its original form and as amended by the Act of February 13, 1925 (28 U.S.C. Section 780). Indeed, this statute is supplemented and reinforced by Rule 19, Sec. 4 of the Rules of this Court.

The identity of the statutes is demonstrated in the opinion of the Court of Appeals (R. pp. 403-404) and need not be repeated here. Similarly, no further discussion is needed here as to the decisions of this Court and the lower Federal Courts holding that the parallel statute did not constitute authority for the survival of an action where there had been no timely substitution within the terms of the statute.

LeCrone v. McAdoo, 253 U. S. 217, 64 L. Ed. 869 (1920);

John Barton Payne v. Industrial Board of Illinois, 258 U. S. 613, 66 L. Ed. 790 (1922);

U. S. ex rel. Claussen v. Curran, 276 U. S. 590, 72 L. Ed. 720 (1928);

Black Clawson Co. v. Robertson, 71 Fed. (2d) 536 (C.A. D.C., 1934);

Martin v. Coe, 83 Fed. (2d) 606 (U.S.C.A.D.C., 1936);

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Becker Steel Co. of America v. Hicks, 1 Fed. Supp. 300 (D.C. S.D. N.Y., 1932); affd. 66 Fed. (2d) 497 (2d C.C.A., 1933);

Bowles v. Ohlhausen, 71 Fed. Supp. 199 (D.C., N.D., Ill., E.D., 1947).

Petitioners make some effort (Petition pp. 15-18) to avoid the clear effect of these cases upon the interpretation of the joint resolution in question, apparently upon the sole basis that the parallel statute refers to the separation from office of individuals while the joint resolution (using identical language) refers to the dissolution of corporations. It seems elementary, however, that where this Court has consistently interpreted the language of the earlier statute prior to the enactment of the joint resolution, the congressional intent in using identical language in the joint resolution clearly requires identical interpretation thereof. The Court of Appeals for the Ninth Circuit so held, and its holding is patently correct and in accord with the decisions of this Court.

Petitioners, in seeking authority for their strained construction of the language of the joint resolution, rely solely upon cases construing state statutes and upon the case of *Gaynor v. Metals Reserve Co.*, 166

Fed. (2d) 1011 (8th C.C.A., 1948). We will discuss the *Gaynor* case below, and it is clear that the interpretation of state statutes differently worded and drawn is hardly persuasive when opposed to decisions of this Court upon Acts of Congress identical in language with the present legislative enactment.

To summarize, it is undisputed that Defense Supplies Corporation was dissolved by the joint resolution of June 30, 1945, and that no motion to substitute Reconstruction Finance Corporation was made within the 12-months period delimited in the statute. It is clear that dissolution of a corporation abates pending litigation to which it is a party in the absence of statutory authority for its survival. This Court and the lower Federal Courts have consistently interpreted an Act of Congress identical in language with the joint resolution as inadequate statutory authority for the survival of an action. The Court of Appeals very properly followed these holdings of this Court and held that in the absence of timely substitution, the present action abated.

Petitioners' charge of error in that holding of the Court of Appeals is itself based upon two basic errors. Since these errors also appear to be the basis for the decision of the Court of Appeals for the 8th Circuit in the *Gaynor* case (discussed below), and for the rather emotional dissent of Judge Healy in the present case, they require brief comment here. First, petitioners fall into the major error of considering only a very small portion of the statute in question, hopefully ignoring the balance thereof; and secondly,

they persistently ignore the fundamental difference between a cause of action and a particular action brought upon that cause of action.

Petitioners assert that the Court of Appeals held the present action abated "notwithstanding the specific provision in the joint resolution that no suit theretofore commenced by or against DSC should abate by reason of its enactment." (Petition, p. 9.) Petitioners' assertion might have merit if the portion of one sentence of the Joint resolution upon which they rely stood alone, but it does not. Section 2 thereof does state:

> "* * * No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * * "

but this fragment, upon which petitioners rely, is but a part. The Joint Resolution continues:

> "* * * BUT *the Court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.* (Emphasis added.)

This portion of the sentence, which petitioners choose to ignore, provides a specific procedure to be followed within a specific time if the action is to survive the dissolution of the named corporations. The necessity of following that procedure within the time limited is

emphasized by the use of the word "but." If the section read that the action should not abate by reason of the enactment of the joint resolution "*and*" the Court, on motion, etc., might allow substitution, then there might be merit in petitioners' argument. But the section provides that the action should not abate "by reason of the enactment of this joint resolution, *but* the court, on motion, etc." filed within twelve months, showing necessity for the survival of the action, "*may* allow the same to be maintained" by the Reconstruction Finance Corporation. Clearly, in the absence of such motion within the period limited, the action will not survive.

Not only do petitioners ignore this portion of the Joint Resolution, but they neglect the language of command contained therein, which is relied upon by the Court of Appeals. (R. pp. 398-400.) The first section of the Resolution directs that the duties, etc., of the dissolved corporation "*shall*" be performed by the Reconstruction Finance Corporation, and the second section directs that that corporation "*shall*" assume all liabilities, etc. In this case the Reconstruction Finance Corporation failed completely in its express duty as commanded by Congress, and it is that failure which prevented the survival of the action.

Petitioners seek to avoid their failure to act within the twelve-months period by asserting that that limitation does not mean what it says. The Court of Appeals points out (R. pp. 401-402) that the limitation cannot be ignored, but petitioners (Petition, p. 14) suggest that the limitation applies to the basic right to

sue Reconstruction Finance Corporation rather than to substitution. Not only does this suggestion violate every rule of statutory construction, but it demonstrates again the second basic error upon which petitioners' arguments are based.

Petitioners suggest that abatement of this action will destroy the right or cause of action. To so suggest is to ignore the fundamental distinction between a cause of action and a particular action brought thereon. This distinction is pointed out in the opinion of the Court of Appeals (R., pp. 402, 409-411), and is discussed with great clarity by this Court in *Fix v. Philadelphia Barge Co.*, 290 U.S. 530, 78 L. Ed. 481 (1934). The Joint Resolution transfers the cause of action to Reconstruction Finance Corporation without reservation; it permits survival of a particular proceeding brought upon that cause of action if, and only if, Reconstruction Finance Corporation moves for substitution in the action within the twelve-months period, and shows a necessity for the survival of *that* action. The failure to so move within that time prevents the survival of the particular action, but it has no effect whatever upon the admitted right of Reconstruction Finance Corporation to bring a new suit upon the *cause* of action. The Court of Appeals here properly held the particular action abated by reason of the failure to move for substitution; it did not hold, nor could it, that the failure had any effect on the *cause of action* itself. Petitioners' failure to recognize this elementary distinction is the second basic fallacy upon which their arguments are based.

The decision of the Court of Appeals for the Ninth Circuit was entirely free from error, and petitioners' unsupported charges of error therein constitute no valid reason for this Court to grant a writ of certiorari.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE CITED DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners assert, as an additional reason for this Court to grant their petition for a writ of certiorari, that the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Gaynor v. Metals Reserve,* 166 Fed. (2d) 1011 (1948).

We believe that while that decision is erroneous, the error of the Court of Appeals for the Eighth Circuit is not a compelling reason for this Court to grant a writ of certiorari here, as the cases may be reconciled, and review by this Court is not necessary to secure uniformity of decision.

Since error in the decision of the *Gaynor* case is certainly not by itself a ground for the granting of the petition herein, we will point out the errors therein only briefly. First, the Court therein ignores the elementary distinction between a cause of action and a particular action brought thereon (see *Fix v. Philadelphia Barge Co.,* supra.) Indeed, the Court states (p. 1015): "To preserve a cause of action is to preserve the right to prosecute that cause of action to

final judgment." Standing alone, that statement is correct, but the Court goes further and incorrectly assumes that the preservation of the right to prosecute a cause of action to judgment includes the right to prosecute a *particular* action. The Court apparently bases this erroneous assumption upon a South Dakota statute, and wholly ignores all reason and authority.

Second, the Court of Appeals for the Eighth Circuit does not mention or discuss any of the cases decided by this Court in construing a statute *in pari materia* (see supra, p. 9); and, like petitioners herein, it relies upon a portion of the Joint Resolution without any consideration of the compelling nature of the balance of that Resolution.

All of these errors are pointed out by the Court of Appeals in the instant case (R., pp. 411-412) in stating that it is not in accord with the *Gaynor* decision. Those errors, however, or the stated disapproval of that decision, are not compelling reasons for granting the petition herein, since the two cases are reconcilable and not in conflict.

The present case was commenced by Defense Supplies Corporation and was at all times being maintained by that corporation until its dissolution. The Joint Resolution dissolving that corporation commanded that Reconstruction Finance Corporation "shall" perform the duties of the dissolved corporations. In this duty Reconstruction Finance Corporation failed, and by reason of that failure the Court of Appeals held that the action abated. In the *Gaynor*

case, the action was against one of the dissolved corporations, and again Reconstruction Finance Corporation failed in its stated duty, and the Court of Appeals for the Eighth Circuit held that it could not take advantage of that failure.

Erroneous though the *Gaynor* decision be, it is not on its facts in conflict with the present decision, and hence there is no compelling reason for this Court to grant the petition for a writ of certiorari in order to secure uniformity of decision.

THERE IS NO SHOWING OF IMPORTANCE TO THE UNITED STATES BECAUSE OF OTHER LITIGATION.

In conclusion petitioners argue (Petition, pp. 19-20) that a decision by this Court is important to the United States because a considerable body of litigation was pending on July 1, 1945, by and against the corporations dissolved by the Joint Resolution of June 30, 1945. Petitioners argue, without any support either within or without the record, that in some of these illusive cases counsel for the Reconstruction Finance Corporation *may* have failed in their duty under the Joint Resolution to move for substitution within the time limited, and that consequently there *may* be cases in which an effort will now be made to re-open such litigation after final judgment.

Without entering into a discussion of the effect of such a motion upon a judgment which has become final, we wish only to observe that not only is there no

showing of the existence of any such actions, but that we are unable to place credence in the thesis that attorneys for the Reconstruction Finance Corporation have been generally so grossly negligent as to fail in their clear duty under the Joint Resolution of June 30, 1945. That counsel have not been so negligent in their duty is shown in cases such as *The Kongo,* 155 Fed. (2d) 492 (6th CCA 1946) and *Atlantic Meat Co. v. R.F.C.*, 155 Fed. (2d) 533 (U.S.E.C.A., 1946), where timely motions for substitution under the Joint Resolution were made and granted.

Not only have petitioners failed to make any showing that there is pending litigation dependent upon a decision of this case by this Court, but their suggestion of the existence of such litigation is based solely upon the wholly improper assumption that counsel for the Reconstruction Finance Corporation in other cases have been negligent and derelict in their clear and express duty under the Joint Resolution. An argument based upon such assumption is hardly appealing as a ground for granting the present petition for a writ of certiorari.

CONCLUSION.

It is respectfully submitted that petitioners have shown no valid reason why this Court should exercise its discretion and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. That decision was correct and was not in conflict with the cited decision of the United

States Court of Appeals for the Eighth Circuit, and the matter is not one of sufficient importance to require review by this Court. Furthermore, as set forth at length in the Brief of Respondent Capitol Chevrolet Company, petitioners have wholly failed in their burden of showing jurisdiction in this Court to entertain or grant the petition for writ of certiorari.

Dated, San Francisco, California,
October 25, 1948.

Respectfully submitted,
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DEFENSE SUPPLIES CORPORATION, and RECONSTRUCTION FINANCE CORPORATION,

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LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW and CLYDE W. HENRY,

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BRIEF OF RESPONDENTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 298

DEFENSE SUPPLIES CORPORATION, and RECONSTRUCTION FINANCE CORPORATION,
Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW and CLYDE W. HENRY,
Respondents.

BRIEF OF RESPONDENTS, LAWRENCE WAREHOUSE COMPANY AND CAPITOL CHEVROLET COMPANY.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 396-425) is reported at 168 F. 2d 199. Earlier opinions of the Court of Appeals (R. 370-380) and of the United States District Court for the Northern District of California (R. 63-75) not

concerned with the issues now before the Court are reported at 164 F. 2d 773 and 67 F. Supp. 16, respectively.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1948 (R. 426-427). A petition for rehearing was denied on May 13, 1948 (R. 428). On August 12, 1948, the time to petition for certiorari was extended to October 1, 1948, by the Chief Justice (R. 430). The petition for writ of certiorari was filed on September 24, 1948, and granted on November 8, 1948.

The petitioners assert that jurisdiction of this Court rests upon 28 U.S.C.A. 1254, which said section provides for jurisdiction:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree;"

In the Court of Appeals below and here respondents have asserted a lack of jurisdiction for the reason that DSC, named below as a party plaintiff and as one of the petitioners in this matter, ceased to exist on July 1, 1945, and that RFC, the other named petitioner, is not now and never has been a party to this action. Application for a writ of certiorari was not, therefore, granted upon the petition of a "party to a civil action", since one named petitioner was not in existence and the other named petitioner was a stranger to the action.

Furthermore, the time for filing a petition for certiorari had expired since the judgment of the Court of Appeals was rendered April 6, 1948 and the petition for certiorari was not filed until September 24, 1948. Ordinarily a petition for rehearing in the Court of Appeals extends the time for applying for certiorari. But, here, the order of the Court of Appeals was that the Defense Supplies Corporation was non-existent, and therefore that the action brought in its name had to be vacated. The motion to substitute RFC into the case to correct a "formal defect" of the parties was not granted. Hence, the attorneys acting in the name of DSC were put on notice that the purported corporation for which they were acting was dissolved and that they, in effect, had no authority to act for that defunct corporation. In the light of this situation, there was no power on their part to apply for a rehearing for a corporation that they then knew was defunct, and that the Court had ruled was defunct, and the alleged petition for rehearing was a nullity. Therefore, the time to apply for certiorari dated from April 6, 1948 and not from the date of the denial of the petition for rehearing on May 13, 1948. We do not know whether these facts were presented to this Court in the application for extension of time to petition this Court for certiorari, but in any event the petition for certiorari, as governed by statute, came too late in this case, in view of the defunct nature of the corporation.

The respondents, therefore, assert that this Court is without jurisdiction and respectfully petition that the writ be dismissed for lack of jurisdiction.

STATUTORY PROVISIONS INVOLVED.

The Joint Resolution of June 30, 1945, c. 215, 59 Stat. 310, reads as follows:

> That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.
>
> Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determina-

tion of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945.

STATEMENT OF THE CASE.

Petitioners' statement of facts is in the main correct, but throughout the Brief Petitioners assert a serious mis-statement of fact upon which a large portion of their argument is based. In view of the importance of the chronological history in this matter, we set it forth below in tabular form.

1944	
February 16th	Complaint filed
1945	
February 13th, 14th and 15th	Submission of evidence and oral argument
July 1st	*Date of dissolution of Defense Supplies Corporation*
July 2nd	Closing brief filed in the name of Defense Supplies Corporation
July 16th	Order of submission filed and entered
1946	
January 9th	Court ordered judgment for plaintiff
February 20th	Court ordered findings prepared
March 22nd	Proposed judgment and findings lodged
March 29th	Proposed additional findings lodged
April 3rd	Findings settled
April 15th	Judgment filed and entered
April 29th	Motion for new trial denied

June 14th	Notice of appeal of Lawrence Warehouse Company served and filed
June 19th	Notice of appeal of Defense Supplies Corporation filed
June 30th	*Last day for Reconstruction Finance Corporation to move for substitution*
July 11th	Notice of appeal of Capitol Chevrolet Company filed
1947	
October 14th	Appeals of Defense Supplies Corporation, Lawrence Warehouse Company and Capitol Chevrolet Company argued in Court of Appeals
December 5th	Decision and judgment of Court of Appeals
1948	
January 2nd	Petitions for rehearing denied
February 17th	Motions in Court of Appeals to vacate its decision, reconsider the matter and remand it to the District Court with instructions to dismiss
March 2nd	Motion filed in the name of Defense Supplies Corporation and Reconstruction Finance Corporation for an order amending the pleadings by substituting Reconstruction Finance Corporation as plaintiff
April 6th	Opinion and Decision of the Court of Appeals denying motion for order amending the pleadings; granting respondents' motion, vacating the decision and remanding the case to the District Court for dismissal
May 13th	Petitions for rehearing denied and opinion amended

It is to be noted that petitioner Defense Supplies Corporation has had no existence since July 1, 1945

and that the petitioner Reconstruction Finance Corporation is not now, and never has been, a party to the action and has never moved for substitution or intervention herein except by "Motion to Amend the Pleadings" which said motion was denied on April 6, 1948.

It is also to be noted that Defense Supplies Corporation, the sole party plaintiff in the action below, was dissolved some time prior to the submission of the cause by the District Court and long prior to entry of judgment. Petitioners have assumed throughout their brief that the trial had been completed prior to the dissolution of DSC and have based a considerable portion of their argument upon that misconception. For example, on page 3 of the brief, under the title "Questions Presented", the petitioners assert:

> "An action instituted by Defense Supplies Corporation was fully tried and argued prior to July 1, 1945."

On page 5 of the brief:

> "After hearing argument the court on February 15, 1945, ordered that the motions to dismiss and the cause be submitted for consideration and decision on memoranda to be subsequently filed and that the case be continued to May 1, 1945, for submission."

On page 9 of the brief:

> "The trial of the action had been completed before the enactment of the joint resolution. The judgment of the district court was rendered before the expiration of the twelve month period."

On page 11:

"The judgment was rendered by the district court when DSC was still in existence * * *"

On page 13:

"Thus the trial of the action was concluded several months before the joint resolution was enacted."

On page 34:

"The judgment was rendered by the district court when DSC was still alive and should be upheld as valid notwithstanding the subsequent expiration of powers."

Again on the same page:

"It has been shown that the case had been fully tried and argued before the enactment of the joint resolution providing for the dissolution of DSC."

At the bottom of that page:

"This judgment was rendered by the District Court when there can be no question that the DSC was still alive and, therefore, no question of its validity at the time of entry."

The effect of such statements and the reliance placed by the petitioners thereon is indicated by their statement on page 38 of the brief in which they state:

"But whether or not the circumstances are deemed to constitute a waiver, *it is clear that the subsequent dissolution of DSC did not render the prior judgment invalid.*" (Emphasis ours.)

The fact of the matter is that the concluding brief filed in the name of the DSC was not filed until July 2, 1945, one day after the dissolution of the DSC. The cause was not submitted to the District Court until July 16, 1945, that is to say, sixteen days after the dissolution of the DSC and the judgment of the District Court was not entered until April 15, 1946, approximately 9½ months after DSC had been dissolved. Thus the trial concluded 9½ months *after* the dissolution of DSC by the Joint Resolution of June 30, 1945 rather than several months *before* the dissolution as petitioners assert. (Brief p. 13.)

There was no judgment rendered prior to the dissolution of DSC. There was no judgment while DSC was in existence.

QUESTIONS INVOLVED.

1. Whether a corporation created by Act of Congress, such as Defense Supplies Corporation, ceases to exist when it is abolished by an Act of Congress.

2. Whether a new corporation, RFC, to which all the assets and liabilities of a dissolved corporation are transferred, has to assert its rights in the particular case pending in the mode and manner provided by Congress and in the time, to-wit, twelve months, specified by Congress.

3. Whether the District Court had jurisdiction or power to proceed with a pending trial after the dissolution of the corporate plaintiff, in the absence of an application for substitution.

4. Whether argument, pleadings and other documents filed by counsel appearing in the name of a dissolved corporation may properly be received and filed as part of the record in the case.

5. Whether all proceedings conducted in the District Court after the dissolution of the plaintiff DSC were void for want of jurisdiction of a party plaintiff.

6. Whether the judgment entered by the District Court nine and one-half months after the dissolution of the DSC was void.

7. Whether the failure of the RFC to move that it be substituted in the particular action in the manner and within the time fixed by the Congressional mandate terminated its power to do so, thus causing the particular action to terminate for want of a party plaintiff.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

Defense Supplies Corporation, plaintiff in the instant action, was a corporation created by and organized under an Act of Congress. It was given power to contract and to sue and be sued in its own name; it was not clothed with sovereign immunity, and its standing before this Court is that of an ordinary private corporation. During the trial of the action in the District Court, after the taking of testimony but prior to the submission of the cause and long prior to the entry of judgment, this corporation,

created by Act of Congress, was dissolved by Act of Congress on July 1, 1945.

The question involved here is as to the effect upon the then pending action of that dissolution of the corporate plaintiff.

It is fundamental that dissolution of a corporation abates a pending action to which it is a party, in the absence of statutory authority for the survival of the action. The only statute which made any provision for survival of the present action was the Joint Resolution of June 30, 1945, the statute which dissolved DSC while the action was pending. The joint resolution which dissolved the DSC transferred all functions, powers, duties and authority of the DSC to the RFC, together with all of its documents, records, assets and liabilities of every kind and nature. Having so transferred everything the DSC had to the RFC, the joint resolution then proceeded to dissolve the DSC. From July 1, 1945 the DSC, named as plaintiff in an action at law then on trial in the District Court was without functions, powers, duties or authority; had no documents, books, records, accounts, assets or liabilities of any kind or nature, and its naked corporate shell had been dissolved by an Act of Congress. It must therefore be clear that there was no such legal entity as the DSC before the Court at any time after July 1, 1945. There was at no time after that date a party plaintiff in the then pending litigation.

The Joint Resolution further provided that pending actions by and against DSC should not abate by

virtue of the passage of the Joint Resolution alone, but that the Court, upon the proper showing made within twelve months, might allow such actions to be maintained by or against RFC.

It is the position of respondents that under the terms of the Joint Resolution, no further action could properly be taken in the action then pending in the District Court until and after RFC, under the terms of that statute, upon proper motion made and granted within the time limited, was substituted as party plaintiff. Barring such action by RFC, the pending proceeding was suspended for lack of any party plaintiff, and the District Court was without any power or jurisdiction to proceed further with the action or to enter judgment therein. Only by strict compliance with the terms of the statute was RFC entitled to be substituted as party plaintiff, and only upon such substitution would the District Court have power or jurisdiction to proceed with the pending action and enter judgment therein. Under no other circumstances could the action survive.

Not only is this conclusion the only proper one under the terms of the statute, but it is reinforced by a series of decisions of this Court and the lower Federal Courts interpreting a statute *in pari materia*. It is fundamental that Congress, by using in a new statutory enactment language which has been interpreted by this Court in an earlier statute, thereby approves the interpretation placed upon that language and intends the same effect to be given to the new statute.

In the present case RFC, which alone could exercise any of the powers of the dissolved DSC and which alone had the duty of moving for substitution within the time limited, did nothing. Instead, counsel previously appearing for DSC, knowing of its dissolution (R. 398), continued to prosecute the then pending action, without at any time advising the Court that they appeared in the name of the dissolved and nonexistent plaintiff. Under the circumstances, the continued prosecution and the submission of the cause was a fraud upon the Court and the judgment entered by the District Court was an act done *in vacuo* and wholly beyond the jurisdiction of the Court. The judgment entered was void.

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2. DEFENSE SUPPLIES CORPORATION WAS A CORPORATION CREATED UNDER AN ACT OF CONGRESS AND WAS BY ACT OF CONGRESS DISSOLVED ON JULY 1, 1945.

Preliminarily, some discussion is essential as to the nature of Defense Supplies Corporation, plaintiff in the action below. Such discussion is necessary because of the assertions by petitioners (Brief. pp. 38-43) that the United States was the real plaintiff and that failure to substitute any party plaintiff upon the dissolution of DSC was a mere "defect in form".

In fact, however, DSC was admittedly a corporation, a corporation organized under an Act of Congress, granted power to contract and to hold property in its own name, to sue and be sued in its own name, and to exercise all of the powers of an ordinary corpo-

ration (R. pp. 4, 78). DSC here held property in its own name and sued in its own name for alleged damage to that property. While that suit was pending and before the cause had been submitted, DSC was dissolved by an Act of the Congress which created it, its functions, duties, powers, and assets and liabilities being transferred to RFC, with any pending actions by or against it being specifically dealt with in the statute which dissolved it.

The status of governmental or goverment owned corporations before the law is precisely that of privately owned corporations.

Bank of the United States v. Planters Bank, 9 Wheaton 904, 6 L. Ed. 244 (1824).

The sovereign immunity of the United States does not attach to a corporation created by the United States, regardless of the fact that the United States owns the stock of that corporation.

Sloan Shipyards Corp. v. U. S. Shipping Board E. F. Corp., 258 U.S. 549, 66 L. Ed. 762 (1922);

Keifer & Keifer v. R.F.C., 306 U.S. 381, 83 L. Ed. 784 (1939);

R.F.C. v. J. G. Menihan Corp., 312 U.S. 81, 85 L. Ed. 595 (1941).

In the latter case (*R.F.C. v. J. G. Menihan Corp.*) Mr. Chief Justice Hughes clearly indicates that a government owned corporation (there the RFC) acts in a proprietary capacity and not as the United States itself, being subject to the normal incidents of litigation and having none of the immunity of the

sovereign. It seems clear that DSC here is to be treated as an ordinary corporation, and that Congress has so regarded it.

In spite of this, petitioners seek to disregard the corporate entity of DSC, asserting that the United States was the real party plaintiff and that DSC was only a "nominal plaintiff." Not only does this contention require a holding by this Court that Congress, both in creating and in dissolving DSC (with specific directions as to the disposition of any pending suits), was performing futile and meaningless acts, but the authorities cited in support thereof do not support the contention. The bulk of the authorities relied upon are decisions of the lower Federal Courts regarding suits brought by the O.P.A. Administrator (see cases cited Pet.'s Brief pp. 40-41), holding that such suits are brought by the administrator on behalf of the United States. This proposition is hardly debatable, as the Act itself (Sec. 205 (e) of the Emergency Price Control Act as amended) provides that "the administrator may institute such action on behalf of the United States". The treatment by the lower Federal Courts of representative actions brought by an executive administrator under such a statute is hardly persuasive in determining the status of a corporation created and dissolved by Act of Congress. This is particularly true, since there is in fact a conflict among such cases with respect to substitutions (see: *Bowles v. Ohlhausen*, 71 Fed. Supp. 199 (D.C., N.D. Ill., E.D. 1947)) and such substitution has been deemed proper in the only case to reach this Court

(*Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 91 L. Ed. 1375 (1947)).

The other cases cited by the petitioners are no more persuasive. In the case of *Cherry Cotton Mills v. United States*, 327 U. S. 536, 90 L. Ed. 835 (1946), the Court held in effect that where one government agency or corporation owed a debt to a citizen and the same citizen was indebted to another corporate agency, the right to set-off could be invoked by the government agency to whom the debt was owed. In the case of *Southern Pacific Co. v. R. F. C.*, 161 F. (2d) 56 (9th CCA, 1947), the Court merely held that the R.F.C. as a corporation owned by the Government of the United States was entitled to receive the benefit of reduced railroad rates applying to all shipments of goods owned by the Government of the United States. In the case of *Defense Supplies Corp. v. United States Lines Co.*, 148 F. (2d) 311 (2d CCA, 1945), the Court held that two corporations each owned by the Government of the United States could not sue one another under the terms of the Suits in Admiralty Act. None of these cases or the other cases cited with them in the petitioners' brief bears any relation to the question before this Court; that is to say, the question of the effect of the dissolution of a corporation owned by the United States where the congressional mandate dissolving that corporation has specifically provided, first, the agency that is to exercise such rights as were formerly held by the dissolved corporation, and then has specifically provided the time, manner and means with which such

rights must be exercised. There is no need in the present action to go beyond the statute itself for by the Joint Resolution the Congress specifically determined the time, manner and means with which the functions of the former corporation were to be exercised. The power of the Congress so to do must be undisputed.

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3. **DISSOLUTION OF A CORPORATION ABATES A PENDING ACTION IN THE ABSENCE OF STATUTORY AUTHORITY FOR ITS SURVIVAL.**

It cannot be disputed that DSC was dissolved by the Joint Resolution of June 30, 1945. Before proceeding to a discussion of the terms of the Joint Resolution itself, mention must be made of certain fundamental rules of law which have been disregarded by petitioners.

First, it is elementary that the dissolution of a corporate party abates pending actions to which it is a party in the absence of a statute providing authority for the survival of the actions.

National Bank v. Colby, 21 Wall. 609, 22 L. Ed. 687 (1874);

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634 (1927);

Chicago T. & T. Co. v. 4136 Wilcox Bldg. Corp., 302 U.S. 120, 82 L. Ed. 147 (1937).

It is apparent that in the absence of some statutory authority for survival, the action pending in the District Court could not survive the dissolution of DSC.

Petitioners' only attack upon this basic rule is based upon a misconception of the facts. They argue (Brief pp. 34-38) that the dissolution of DSC did not render the judgment of the District Court void. This argument, however, is based upon the oftstated assumption (Petitioners' Brief pp. 9, 11, 13, 34, 38) that the dissolution of DSC was subsequent to the entry of judgment. This wholly erroneous assumption is not supported by the record; in fact, DSC was dissolved before the submission of the cause and nine and one-half months prior to the entry of judgment. The argument of petitioners, and the cases cited in support thereof, are simply not in point. Thus in *Walling v. Reuter,* 321 U.S. 671, 88 L.Ed. 1001 (1944), and *Mitchell v. Overman,* 103 U.S. 62, 26 L.Ed. 369 (1881), the cases principally relied upon by petitioners on this point, it is perfectly clear that judgment had been entered or the cause submitted long before the dissolution or death of a party. So too in the other cases cited by petitioners at page 37 of their brief. Here the action was pending at the time of the dissolution of DSC, and it necessarily abated in the absence of statutory authority for its continuance.

In this connection, we must also point out a distinction constantly ignored by petitioners, that is, the difference between a cause of action and a particular proceeding or action brought thereon. This fundamental difference is not only ignored by petitioners, but is one of the major errors in *Gaynor v. Metals Reserve,* 166 Fed. (2d) 1011 (8th CCA. 1948), the case principally relied upon by petitioners.

The distinction is clearly set out by this Court in *Fix v. Philadelphia Barge Co.*, 290 U. S. 530, 78 L. Ed. 481 (1934). While a cause of action may survive the dissolution of a corporation, a particular proceeding or action brought thereon abates upon that dissolution in the absence of statutory authority for the survival of that particular proceeding or action.

Thus here, the cause of action may well have survived the dissolution of DSC. Whether the particular action pending upon that cause of action survived or not depends upon whether there was specific statutory authority for survival of *that* action.

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4. **THE EFFECT OF THE JOINT RESOLUTION OF JUNE 30, 1945.**

A. The statutory language.

It will perhaps clarify the presentation of the argument on behalf of the respondents if we first state our view of the effect of the Joint Resolution of June 30, 1945, and then proceed to discuss the various arguments advanced on behalf of the petitioners in their brief.

The position of the respondents is stated in the opinion of the majority in the Court of Appeals and we believe that position to be sound and well taken. It is this: DSC was a corporate agency created by an Act of Congress (Act of January 22, 1932, Chapter VIII, 47 Stat. at Large p. 59). By that Act it was granted the capacity to sue and be sued; to own property and to perform other corporate functions. It

existed for the purposes stated in the Congressional enactment which created it and its corporate life was dependent upon the decision of that legislative body.

During the course of its corporate existence it brought an action against these respondents and that action proceeded to trial in the District Court. While that action was pending in the District Court, the Congress of the United States, by Joint Resolution of June 30, 1945, terminated the existence of the DSC. The power of the Congress to thus terminate the life of its creature is indisputable. The Congressional enactment consisted of two sections. By the terms of section 1 of the Joint Resolution, Congress transferred to the RFC all functions, powers, duties and authority of the DSC together with all its documents, records, assets and liabilities of every kind and nature. Had the Congress gone no further the DSC could have continued in existence but only as a naked corporate entity without powers, authority, assets or liabilities of any kind or nature. The language of the Act is so broad and so all-inclusive that it is perfectly clear that from the moment of its enactment the DSC was without power or right to perform any act. Obviously it could no longer sue or be sued; it could no longer employ counsel; it was purely a legal fiction existing only in the legal imagination—a bodyless legal creation. Everything that it had ever possessed, tangible or intangible, was by the terms of the Joint Resolution taken from it.

Having thus stripped its creature of every vestige of life, the Congress then proceeded to dissolve the

corporation itself. The language of the Act is clear, immediate and mandatory: "The designated corporations are hereby dissolved". Certainly in the language of the first section of the Joint Resolution there is no possible ambiguity and no possible need for interpretation of the Congressional intent. The corporations were destroyed as completely as though they had never existed.

Such then was the condition of the corporation, then a plaintiff before the District Court, after the passage of the Joint Resolution of June 30, 1945. The named plaintiff in that action was without assets or liabilities, functions, powers, duties or authority. It had no documents, books of account, records—none of the attributes of corporate existence. It could neither pay a judgment nor collect one; it had no officers, no employees—not even a name. To say that this nonexistent bodyless creature had the power or authority to continue the prosecution of a lawsuit is to state that a dead creature still lives. Yet for a period of nine and one-half months after every vestige of life had been stripped from the DSC, counsel appearing in its name continued the prosecution of an action at law in its name before the District Court and nine and one-half months after its dissolution that Court, not knowing of the dissolution, rendered a judgment in favor of this non existent plaintiff.

The petitioners have pointed out in their brief the fact that the Joint Resolution was prepared by counsel for the RFC and submitted to Congress for action. They have been careful to point out that when first

submitted the Resolution contained only that portion now designated as section 1. They have also pointed out that at least one member of Congress (Senator Taft) was of the opinion that the resolution as submitted was not sufficient and that, acting upon his suggestion, counsel for the RFC prepared and submitted to Congress the second section of the Joint Resolution and that thereupon the Resolution containing both sections 1 and 2 was passed by Congress. While the first section of the Act is broad and all-inclusive in its terms, the second section deals particularly and specifically with liabilities and with suits, actions and proceedings.

The Congress first dealt with the subject of liabilities of the DSC which had not yet ripened into suits, actions or other proceedings. It is clear from the first sentence of the second section that as to such causes of action, Congress intended that the RFC (and only the RFC), should have the power to sue or be sued. The second sentence of the second section dealt with suits, actions or other proceedings already commenced, and is definite and specific with respect to the disposition of such actions. Under the specific conditions therein stated "the court * * * may allow the same to be maintained by or against the Reconstruction Finance Corporation." No other government agency is mentioned. Congress has determined that the RFC (and only the RFC) shall be the government agency by or against which such actions may be maintained. Where the Congress has by specific mandate described in detail the government agency by or against which

certain actions may be maintained, the congressional intent to exclude the possibility of any other agency bringing or maintaining such actions is clear. This doctrine is so fundamental as to be the subject of a legal maxim "*Includio Unius est Exclusio Alterius*" —"the inclusion of one is the exclusion of the other; the certain designation of one person is the absolute exclusion of all others". (11 Coke 58 b).

This simple legal maxim has received the approval of this Court:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."
>
> *Botany Mills v. United States*, 278 U.S. 282, 289, 73 L. Ed. 379, 385 (1929);
>
> *Raleigh & G. R. Co. v. Reid*, 13 Wall. 269, 270, 20 L. Ed. 570 (1872),

and of the Circuit Court of Appeals of the Ninth Circuit:

> *Paso Robles Mercantile Co. v. Com. Internal Revenue*, 33 Fed. (2d) 653 (9th CCA, 1929).

Petitioners in effect deny this fundamental doctrine by arguing in their brief that substitution was unnecessary since the United States was the real plaintiff in the action. We have discussed this contention above in another connection, but we wish to point out here that not only would petitioners' contention render the actions of Congress futile and meaningless, but it runs contrary to the practice of petitioner RFC both in this Court and the lower Federal Courts. Thus in *R.F.C. v. County of Beaver*, 328 U.S. 204, 90

L. Ed. 1172 (1946), while a case was pending in this Court, RFC successfully moved within the time limited in the Joint Resolution to be substituted as the appellant for one of the corporations named in the Joint Resolution. Similar practice is seen in *The Kongo,* 155 Fed. (2d) 492 (6th CCA, 1946) and *Atlantic Meat Co. v. R.F.C.*, 155 Fed. (2d) 533 (U.S. E.C.A., 1946), in the lower Federal Courts.

Petitioners thus assert that their own settled practice is unnecessary and also that Congress did a futile act in naming the agency privileged to continue pending litigation by or against the dissolved corporations.

The Congress determined that suits, actions and proceedings then pending could only be maintained thereafter by or against the RFC, and went still further in stating the specific method by which substitution might be permitted and the time within which such substitution could be accomplished.

> "No suit, action, or other proceeding lawfully commenced *by* or *against* any of such corporations shall abate by reason of the enactment of this joint resolution, *but* the court on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." (Emphasis ours.)

Thus the person to be substituted and the time and manner are all prescribed and other persons or modes were negatived.

There was certainly no lack of power in the Congress to set forth the precise manner in which actions pending against a government owned corporation could be maintained, and statutes of repose are so common that certainly no claim could be made that the Congress did not have power to limit the time within which actions could be maintained by or against a government owned corporation.

The language of the second section seems to us perfectly clear and unambiguous and it seems unnecessary to invoke rules of judicial interpretation where the language itself makes the meaning manifest. Having first taken from the DSC every vestige of its corporate power or authority and every corporate function and then having destroyed the corporation itself, the Congress proceeded to determine what should be done with pending litigation. In section 1, it had transferred to the RFC all of the assets and liabilities of the DSC, and, therefore, in section 2, it granted to the RFC the right to cause itself to be substituted in then pending actions. That right, however, was circumscribed by the provision that it should be subject to prior approval of the Courts in which the actions were then pending and must be exercised within a twelve months period. Much is made in the brief filed on behalf of petitioners of the language in the second section of the Joint Resolution to the effect that "no suit shall abate by reason of the

enactment of the Joint Resolution". In the argument on behalf of petitioners, they state that, in view of this language, no substitution was necessary in order that pending actions might continue in being. No reference is made in petitioners' brief to the fact that actions at law cannot continue without adversary parties and that the existence of both plaintiff and defendant is a jurisdiction prerequisite.

> "In every action there must be a real plaintiff, and for standing as a party plaintiff it is necessary that plaintiff be a person in law." (47 C.J., Sec. 16, p. 18.)
>
> "* * * it is generally required that a person, in order to be properly qualified to be a party plaintiff, must be possessed of three essential elements or characteristics: (1) legal entity or existence, (2) legal capacity to sue, (3) remedial interest in the cause of action asserted." (Idem., Sec. 15, p. 18.)

From and after the moment of its dissolution on July 1, 1945, Defense Supplies had none of the essential elements of a plaintiff. It had no legal entity or existence, no legal capacity to sue, no remedial interest in the cause of action asserted.

After the death of the DSC, only the defendants were before the Court and unless and until substitution was made, no justiciable controversy existed in the District Court. The trial Court in ignorance of the lack of a proper party plaintiff entered judgment for that plaintiff nine and one-half months after it had ceased to have any existence. Thereafter the parties to the action, including the non-existent plain-

tiff, filed appeals and those appeals were heard by the Circuit Court of Appeals where, again, counsel appearing in the name of the DSC filed briefs and argued upon appeal. The Circuit Court of Appeals, in ignorance of the facts, confirmed the judgment of the District Court. Thereafter, in the course of preparation of a writ of certiorari, respondents discovered the Joint Resolution of July 30, 1945, and by motion brought the matter to the attention of the Circuit Court of Appeals. Thereafter, and for the first time, counsel appearing in the name of the defunct corporation, presented a "motion to amend pleadings and judgment" to correct what was therein described as a "defect in form" by substituting the name Reconstruction Finance Corporation for that of Defense Supplies Corporation wherever it appeared in the pleadings and judgment. It will be noted that at no time was a motion for substitution in the form or manner prescribed in the Joint Resolution ever filed in this action. The motion to correct the "defect in form" was denied and the Reconstruction Finance Corporation is not now, and never has been, a party to this action.

B. Judicial interpretation of the statute.

We believe the language of the Joint Resolution of June 30, 1945, to be so clear and unambiguous as to make it unnecessary to invoke rules of judicial interpretation. Petitioners, however, suggest to this Court certain canons of judicial interpretation with which we must take issue. While it is true that the legislative background of any statute may properly be con-

sidered by a Court in interpreting the language of that statute where patent ambiguity exists, such reference to the legislative background is wholly unnecessary and improper where the statute itself is clear and unambiguous. A statute is to be interpreted in the light of its language and not in the light of suggestions which may have merged in the final statute itself.

Petitioners, in contravention of these basic rules, put the cart before the horse, discussing first the legislative background of the Joint Resolution, and then suggesting that the statutory language, "even considered apart from its Congressional history", (Brief, p. 21) does not support the result reached by the Court of Appeals. They also suggest, in curious fashion, that since the Joint Resolution "was not a carefully drafted provision with other specific ends, it need not be read with the meticulous concern for harmonizing all its terms which is normally accorded legislative action" (Brief, p. 25).

Petitioners' suggestion that the Joint Resolution should not be read with meticulous concern is a rule of judicial interpretation without support either in statute or case law and requires no contravention here. We feel that the statute is clear and unambiguous, but that insofar as it is subject to interpretation, it should be read in accordance with the decisions interpreting a statute in *pari materia*. The Joint Resolution itself has been passed upon by the courts only in the case below and in the case of *Gaynor v. Metals Reserve Co.*, 166 F. (2d) 1011 (8th CCA, 1948); the *Gaynor* case

we will discuss further below, but it is submitted that the Court of Appeals for the Ninth Circuit in the decision below correctly interpreted the Joint Resolution, using proper rules of construction. The Court of Appeals carefully points out (R. 403-404) the parallel provisions of the statute of February 8, 1899 and the language adopted by Congress in the Joint Resolution of June 30, 1945, as follows:

"*No suit*, action or other proceeding lawfully commenced by or against any of such corporations *shall abate by reason of* the enactment of this joint resolution, *but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment showing a necessity for the survival of such suit, * * * to obtain a determination of the questions involved, may allow the same to be maintained by or against* the Reconstruction Finance Corporation."

"That *no suit*, action, or other proceeding lawfully commenced by or against * * * officer of the United States * * * *shall abate by reason* of his death, or expiration of his term of office, * * * *but*, in such event, *the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against* his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

In the instant act, the words "Reconstruction Finance Corporation" are substituted for the words "his successor in office". It is thus seen that Congress copied the words of its prior statute. The specific provisions of the 1945 act control those of the prior Federal Rules of Civil Procedure, rule 25(c), 28 U.S.C.A. following section 723c."

This Act of Congress of February 8, 1899, both in its original form and as amended by the Act of February 3, 1925 (28 U.S.C. Sec. 780), has been many times before this Court and before the lower Federal Courts. In all of these cases, the courts placed upon that statute an interpretation identical with that of the Court below.

LeCroue v. McAdoo, 253 U.S. 217, 64 L. Ed. 869 (1920);

John Barton Payne v. Industrial Board of Illinois, 258 U.S. 613, 66 L. Ed. 790 (1922);

U.S. ex rel. Claussen v. Curran, 276 U.S. 590, 72 L. Ed. 720 (1928);

Black Clawson Co. v. Robertson, 71 Fed. (2d) 536 (C.A.D.C., 1934);

Martin v. Coe, 83 Fed. (2d) 606 (U.S.C.A.D.C. 1936);

Kuttkoff v. Sutherland, 49 Fed. (2d) 944 (D.C. S.D.N.Y. 1931); affd. 66 Fed. (2d) 500 (2d C.C.A., 1933);

Becker Steel Co. of America v. Hicks, 1 Fed. Supp. 300 (D.C. S.D. N.Y., 1932); affd. 66 Fed. (2d) 497 (2d C.C.A., 1933);

Bowles v. Ohlhausen, 71 Fed. Supp. 199 (D.C. N.D., Ill., E.D., 1947).

It is a fundamental rule that when Congress reenacts a statute, the reenactment implies legislative approval of prior construction of the statute. In *Johnson v. Manhattan Railroad Company*, 289 U.S. 479, 500; 77 L. Ed. 1331, 1346 (1933) this Court said:

"In such circumstances, as this Court often has pointed out, reenactment operates as an implied legislative approval of the prior construction—in other words, as a reenactment of the statute as before construed."

See the following additional cases:

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 76 L. Ed. 484 (1932);

McCaughn v. Hershey Chocolate Company, 283 U.S. 488, 75 L. Ed. 1183 (1931);

Heald v. District of Columbia, 254 U.S. 20, 65 L. Ed. 106 (1920).

and see a long series of cases cited in the footnote of *Heald v. District of Columbia*, 65 L. Ed. 106. Therefore, when Congress readopted the language used in the Act of 1899 following this Court's construction in the cases heretofore cited, that construction was approved and intended by Congress.

We may point out that even if this Court should follow the canon of construction suggested by petitioners, and consider the legislative background of the Joint Resolution, such consideration demonstrates only that the Congress believed that the first section of the Joint Resolution standing alone was incomplete, and further demonstrates that the resolution in its final form was prepared and submitted to Congress by the RFC, and that the counsel for the RFC copied the language of the Act of Congress of February 8, 1899 in preparing the Joint Resolution. It must be presumed that counsel for the RFC, as well as Congress, necessarily intended the language of the Joint Resolu-

tion to be given the same effect as had been given to the prior language by the long series of decisions cited above.

It is submitted that the interpretation placed upon the Joint Resolution by the Court of Appeals below not only is squarely in conformity with the language used therein but is the only proper interpretation which might be placed upon that Joint Resolution under any principle of interpretation. The statute is neither great in length nor are the words used therein ambiguous or uncertain in any sense. It sets forth a simple and precise Congressional mandate. The RFC failed to obey the Congressional mandate and cannot now be heard to say that it may with impunity disregard the Congressional mandate. Where the Congress passes a statute of repose, neither a present Federal officer nor his predecessor, nor the officers or directors or general counsel of a government owned corporation may with impunity disregard that statute.

C. The contentions of petitioners.

Petitioners charge error in the opinion of the Court of Appeals below, contending that the Court of Appeals incorrectly construed the meaning of the language of the Joint Resolution of June 30, 1945. To support their contention, they rely principally on the case of *Gaynor v. Metals Reserve Co.*, 166 F. (2d) 1011 (8th CCA, 1948) and upon the cases construing various state statutes. Obviously, the interpretation placed by courts upon state statutes of dissolution using entirely different language can be of little assistance in interpreting the statute with which we are presently

concerned. The decision in the *Gaynor* case, we believe, is wholly erroneous, being based, as are the contentions of the petitioners herein, upon certain fundamental errors.

As we have pointed out above, the Court of Appeals for the 8th Circuit in the *Gaynor* case and petitioners herein in their brief, both ignore the elementary distinction between a particular action or proceeding, and the right or cause of action upon which such a proceeding may have been brought. This distinction, which we have discussed above, is pointed out with great clarity in *Fix v. Philadelphia Barge Co.*, 290 U.S. 530, 78 L. Ed. 481 (1934), wherein the Court states:

> "Failure to comply with the statute forecloses the particular remedy therein provided; it does not destroy the right. There is a clear difference between the action and the *cause* of action." (290 U.S. 533).

That this distinction was ignored by the Court of Appeals for the 8th Circuit in the *Gaynor* case is shown where the Court states at page 1015:

> "To preserve a cause of action is to preserve the right to prosecute that cause of action to final judgment."

Standing alone, that statement is correct, but the Court goes further and incorrectly concludes therefrom that the preservation of the right to prosecute a cause of action to judgment includes the right to prosecute a particular proceeding brought thereon. In other words, that Court incorrectly assumed that if it

dismissed the action there pending, the plaintiff would thereby lose forever the right to bring another action thereon against the proper party. The Court there apparently based this misconception upon a South Dakota statute and ignored all reason and authority.

Further, it is apparent that petitioners herein and the Court of Appeals for the 8th Circuit rest their interpretation of the Joint Resolution of June 30, 1945, upon a portion only of that legislative enactment. They refer at length to that fragment of Section 2 of the Joint Resolution which provides:

> "* * * No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * *".

It is to be noted that this fragment of the Joint Resolution is nearly identical with the language in the Oklahoma statute referred to in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634 (1927), which was construed therein to continue the life of a dissolved corporation for the purpose of pending litigation. Standing alone, that fragment would have permitted the continuance of the present action.

However, that fragment does not stand alone. The Joint Resolution continues:

> "* * * *But* the Court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of

the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation." (Emphasis added.)

This portion of the sentence provides a specific procedure to be followed within a specific time if an action is to survive the dissolution of the named corporations. Petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case refer to the fragment of the Joint Resolution upon which they rely as "mandatory" and to the balance of that section as "permissive". This view is wholly erroneous. The two portions of the section cannot be read separately but must be construed together, and as so read, it is obvious that substitution with in the time limited is in fact mandatory if the action is to survive, and permissive only in that the RFC within its own discretion may or may not choose the action to survive by taking the proper steps within the time limited. This construction is emphasized by the use of the word "*but*". If the section read that the action should not abate by reason of the enactment of the Joint Resolution "*and*" the Court on motion, etc., might allow substitution, then there might be merit in the argument advanced by petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case. But the section provides that the action should not abate "by reason of the enactment of this joint resolution, *but* the court, on motion, etc." filed within twelve months, showing necessity for the survival of the action, "may allow the same to be maintained" by the Reconstruction Finance Corporation. Clearly, in the

absence of such motion within the period limited, the action will not survive.

Not only do petitioners and the Court of Appeals for the 8th Circuit in the *Gaynor* case ignore this portion of the Joint Resolution, but they neglect the language of command contained therein, which is relied upon by the Court of Appeals below (R. pp. 398-400). The first section of the Resolution directs that the duties, etc., of the dissolved corporations "*shall*" be performed by the Reconstruction Finance Corporation, and the second section directs that that corporation "*shall*" assume all liabilities, etc. In this case the Reconstruction Finance Corporation failed completely in its express duty as commanded by Congress, and it is that failure which prevented the survival of the action.

It is submitted that the decision of the Court of Appeals for the 8th Circuit in the *Gaynor* case is wholly erroneous, and that the contentions of petitioners based thereon are without merit.

CONCLUSION.

It is respectfully submitted that this Court should dismiss the Writ of Certiorari for lack of jurisdiction, for the reason that one of the named petitioners, Defense Supplies Corporation, has been dissolved and non existent for a period of over three and one-half years and the other named petitioner, Reconstruction Finance Corporation, is not now and never has been a party to this action, so that there is not now any

proper party petitioner before this Court; and for the further reason that the Writ of Certiorari was improvidently granted by this Court, since the time to petition for Writ of Certiorari had expired at the time the petition was filed.

It is further submitted that if this Court entertains jurisdiction of the cause, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed; said judgment of the Court of Appeals for the Ninth Circuit was correct, since it vacated a judgment of the District Court which was void when entered for lack of jurisdiction and of a party plaintiff then before that Court.

Dated, San Francisco, California,
January 28, 1949.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 298

October Term, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,
Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, AND CLYDE W. HENRY,
Respondents.

BRIEF OF H. C. HARPER, AS AMICUS CURIAE, BY SPECIAL PERMISSION OF THE COURT, IN SUPPORT OF PETITION FOR REHEARING

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IN THE

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No. 298

October Term, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,
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vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, AND CLYDE W. HENRY,
Respondents.

BRIEF OF H. C. HARPER, AS AMICUS CURIAE, BY SPECIAL PERMISSION OF THE COURT, IN SUPPORT OF PETITION FOR REHEARING

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in the case of *Gaynor v. Metals Reserve Company* is reported in 166 F. (2d) 1011 and was filed on March 25, 1948. The opinion of the United States Court of Appeals for the Ninth Circuit in the within case is reported at 168 F. (2d) 199. Per curiam opinion dismissing appellant's appeal on the merits was filed May 6, 1949, but is not yet reported.

STATEMENT

The Brief of Amicus Curiae is filed by special leave of this Court and is on behalf of Keyes C. Gaynor, appellant in the case of *Gaynor v. Metals Reserve Company*, in which an appeal on the merits was submitted on the 9th day of March, 1949, to the United States Court of Appeals for the Eighth Circuit from the judgment of the United States District Court, of South Dakota on September 3, 1948, dismissing plaintiff's cause of action on the grounds that the allegations of plaintiff's amended complaint failed to state a claim upon which relief can be granted. The nature of plaintiff's cause of action is stated in the first paragraph of the opinion of the United States Court of Appeals, Eighth Circuit, in the reported opinion in 166 F. (2d) 1011.

The cause of action of the appellant, Gaynor, against the Metals Reserve Company was originally commenced in the Circuit Court of the State of South Dakota on March 30, 1945; was removed to the U. S. District Court of South Dakota on April 28, 1945, on petition of the Metals Reserve Company on the grounds that said suit is a suit of civil nature at law arising under the laws of the United States, and is a suit over which the District Courts of the United States are given original jurisdiction and the amount in controversy exceeds the sum of $3,000.00. That all of the stock of the Metals Reserve Company, a corporation incorporated under an Act of Congress, is owned by the Reconstruction Finance Corporation, and all of the stock of the Reconstruction Finance Corporation is owned by the United States. That the issues were made up at the June, 1946, term of the United States District Court of South Dakota, but was continued at the June, 1946, term because the defendant

had failed to file answers according to the rules of the Court. That in June, 1947, the defendant, Metals Reserve Company, filed a motion to abate the action because no substitution was made prior to July 1, 1946, under Public Law 109. This was the first knowledge plaintiff had of the passage of Public Law 109. No suggestion of the passage of the Act of Congress had been made by defendant prior to June, 1947, although the said defendant had filed motion in June, 1945, to dismiss on other grounds, which motion was submitted to the Court in September, 1945; answer was filed by Metals Reserve Company in June, 1946, too late under the rules for trial at the June, 1946, term, and the action was continued by consent of the defendant, Metals Reserve Company, until the June, 1947, term of said Court. The same attorney for the defendant, Metals Reserve Company, appeared at all times both in the District Court and the Appellate Court.

ARGUMENT

I.

The effect of the decision of this Honorable Court is to destroy the rights of the interested litigants in both the Eighth and Ninth Circuits without deciding that there was a conflict between the two Circuits, upon which certiorari was granted. The Court has decided questions not raised by any petition or brief and which affect the vested rights of litigants.

The Court in its opinion states:

> "We brought the case here on certiorari, 335 U. S. 857, because of alleged conflict with Gaynor v. Metals Reserve Company, 166 F. 2d 1011, in the Court of Appeals for the Eighth Circuit."

Outside of the above statement this Court never commented on the Gaynor case (166 F. (2d) 1011) in the Eighth Circuit or on the conflict with the case in the Ninth Circuit. Nor did it decide that there was no conflict. The effect of the decision on the rights of the litigant in the Eighth Circuit already has had its repercussions by a per curiam opinion filed in that Court on May 6, 1949, dismissing the appeal of the plaintiff on the grounds that the Court is without jurisdiction to review the merits of the case on appeal. The per curiam opinion referred to is based solely upon the decision herein upon which petition for rehearing is pending. It is significant that the Eighth Circuit per curiam opinion in the Gaynor case, after quoting from the decision of this Court, states:

> "As a result, on July 1, 1946, the action against Metals Reserve Company *'was at an end'* and this court is without jurisdiction to review the merits of the case on appeal. . . ."

The lifting from the opinion of this Court the words "was at an end" makes a finality to the rights of the litigant, Gaynor, without a hearing on his part or anyone representing him and without an opportunity to present cogent reasons against the decision as now rendered by the Supreme Court of the United States. Our position is that if a corporation "has enough life remaining to litigate its actions" then that our rights should not have been wiped out. If, on the other hand, the cause of action survives in Reconstruction Finance Corporation then we should have a right to proceed against that governmental agency on the basis of the cause of action.

The decision of the Supreme Court, which was granted on the basis that there was a conflict between the Eighth and Ninth Circuits, has now decided that the

Ninth Circuit was right and there was no jurisdiction in the Court of Appeals and that the Eighth Circuit was wrong in holding that they had jurisdiction to continue our action but at the same time it holds that the District Court in the Ninth Circuit had a right to enter a judgment after jurisdiction had expired by reason of the Act of Congress, *but that in the Eighth Circuit nothing could happen to preserve our rights.* Such holding leaves the whole situation in hopeless confusion as to the rights of litigants, which the Congress sought to preserve when it adopted the joint resolution. That the Congressional intent was to preserve our rights but place them in the hands of R. F. C. is shown by the discussion of Senator Taft before the Committee on Banking and Currency, S. J. Res. 65, 79th Cong., 1st Sess., page 2.

It was Senator Taft who urged "that contractors might not be in doubt, to have express statements that all liabilities and contracts of these corporations shall be passed on to R. F. C. and R. F. C. shall become responsible for them." (11. 10-11, Hearings before Senate Committee on Currency, 79th Congress, 1st Session.)

If our rights against Metals Reserve Company have lapsed for want of jurisdiction and because of the joint resolution, then our rights still should be preserved on the cause of action as against R. F. C. We should have been afforded a full hearing on the question before this Court's decision becomes final and irrevocable.

It is plain to see that the very result which Public Law 109 sought to avoid ("*No suit, action or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution*") has happened if the decision of the

Supreme Court is to be followed as shown by the Per Curiam opinion of the Eighth Circuit.

We would ask this Honorable Court to grant a rehearing in the *Defense Supplies Corporation v. Lawrence Warehouse* case and to permit the plaintiff and appellant, Keyes C. Gaynor in the *Gaynor v. Metals Reserve Company* case pending on appeal on the merits in the Eighth Circuit to intervene, or in the meantime to file a petition for Writ of Certiorari to this Court from the per curiam decision of the Eighth Circuit, rendered May 6, 1949, wiping out appellant's appeal on the merits (an order was entered May 18, 1949, in the Eighth Circuit giving the appellant, Gaynor, twenty days from the date of the final disposition of the Petition for Rehearing by this Court in the Lawrence Warehouse case to file a petition for rehearing from the Per Curiam opinion in the Eighth Circuit).

We would seek to have our cause (the Gaynor case) heard at the same time as the rehearing which may be granted in Defense Supplies Corporation, pursuant to authority of Section 1254 of the new Federal Judicial Code.

II.

The decision of this Honorable Court is contradictory because in the first part of its opinion the Court sustains the categorical part of Public Law 109, "that no action shall abate," and holds that the Court should not make the additional language "a proviso," but in the latter part of the opinion commands the Court to dismiss any appeals on the merits if substitution was not made before July 1, 1946.

The decision rendered by this Court in *Defense Supplies Corporation v. Lawrence Warehouse Company* in the

first part of the opinion is emphatic in holding that "The Statute states categorically that no action shall abate." Likewise the opinion "disagrees" with the decision in the Ninth Circuit and properly states:

> "If Congress states that no action shall abate, we fail to see why we should make additional language a proviso."

We respectfully submit that the second part of the Court's opinion contradicts the first part by making the additional language (the permissive part as to substitution) a *proviso* or *condition* as to action's continuange. It is the latter part of the Court's opinion in this respect of which we complain and particularly the statement "If Reconstruction Finance Corporation is not substituted within one year, the action by or against the Defense Supplies is, of course, at an end and they are left in statu quo." Reference to the per curiam opinion of the Eighth Circuit in the Gaynor-Metals Reserve case shows that that Court, in spite of their opinion in 166 F. (2d) 1011, adopts the opinion and the quoted language as "binding" and bases their dismissal of the Gaynor case on its merits solely upon the opinion in this Court. It would seem that the above statement, so far as the Gaynor case is concerned, should be regarded as dictum and not controlling.

Much is said of the cases of *LeCroine v. McAdoo*, 253 U. S. 217; *Payne v. Industrial Board*, 258 U. S. 613; and *Claussen v. Curran*, 276 U. S. 500, interpreting the Acts of 1899 and 1925. As pointed out in the opinion being considered by this Court

> "But in 1925 this statute was amended. The command, 'No action shall abate,' was omitted; the

new provision made it unmistakably clear that the validity of the judgment was conditional upon substitution."

As pointed out by this Court the 1925 statute lacked the mandatory declaration, present in Public Law 130, that pending litigation should not abate. And the survival of pending litigation was in the Act of 1925 specifically made conditional on timely substitution, whereas in Public Law No. 109 (the 1945 legislation) no language appears carrying such a condition for survival. This Court, as pointed out, has said that it will not make the "additional language a proviso."

It seems absolutely clear that the cited case of *United States ex rel. Claussen v. Curran*, 276 U. S. 590, is based upon the 1925 Act from which the teeth—"no action shall abate"—have been extracted.

The construction which the Courts have given to the 1899 and 1925 statutes (construed in the above cited cases) is not relevant to the instant case, particularly in the face of the categorical provision in Public Law 109 *against abatement*.

III.

The rule that dissolution of a corporation abates a pending action against the corporation is not applied in case of a merger and consolidation of a corporation with another corporation or on dissolution of a corporation, where the purpose of the merger or dissolution was to transfer the functions and assets of the one corporation to the other corporation together with an assumption of the liabilities by the transferee. Equitable considerations and public policy in such cases prevent abatement.

1 C. J., p. 134, Sec. 214.

Amer. Jur., p. 58, Sec. 55.

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, at p. 261.

Report of Hearing; Senate Journal Resolution 65, May 15, 1945, before Committee on Banking and Currency, U. S. Senate, U. S. Gov't Printing Office, May 15, 1945, bottom of p. 10 and top of p. 11 of said Report.

The effect of Public Law 309 was a merger or consolidation of the corporation, Defense Supplies Corporation, and the corporation, Metals Reserve Company, with the Reconstruction Finance Corporation which under the law owned all the stock in the designated Corporations. Report of Hearing on Senate Resolution 65, May 15, 1945.

In case of a merger and consolidation of a corporation, which is party to a pending action with another corporation or on dissolution of a corporation the pending action does not abate and liability cannot be escaped. This, we believe, is another modification or relaxation of the harsh rule of the Common Law that dissolution abates a pending action. Moreover, even in the absence of a statutory provision with reference to merger, it is held by the weight of authority that pending actions, whether by or against a corporation, do not abate by reason of its merger or consolidation with another corporation. 1 Am. Jur., page 58, Section 55.

Where the statute with reference to merger of corporations provides that the merger *shall not abate* pending actions, or the new corporation may be substituted as a party, such substitution is optional and not necessary, and the action may proceed without it. 1 C. J., page 134, Section 214. Also see *Edison Elec. Light Co. v. Westing*

house, 34 Fed. 232 at page 233, and *Edison Elec. Lt. Co. v. U. S. Electric Lighting Co.*, 52 Fed. 300 at page 314 (9), which cases are cited in the *Oklahoma Natural Gas Co. v. Oklahoma* case, supra.

We submit that the decision under consideration on this petition for rehearing not only fails to recognize the general rule applied in case of merger to pending litigation, but permits the transferee corporation to escape a liability which Public Law 109 requires it to assume.

IV.

Under the laws of California and the State of South Dakota no surviving or continuing action abates by transfer of any interest, and revivor is a matter of right without any limitation of time. The State statute governs in the Federal Courts.

Section 33.0414, South Dakota Code of 1939.

Winslow v. Domestic Eng. Co., 20 F. Supp. 578.

United States ex rel. Johnson v. Morley Constr. Co., (2d Cir.), 98 F. (2d) 781, at page 785.

Guaranty Trust Co. of N. Y. v. York, 326 U. S. 99, at page 113.

Erie R. R. Co. v. Tompkins, 304 U. S. 817, at page 823.

Klaxon v. Stentor Elec. Co., 313 U. S. 1020, at page 102.

Cloquet Lbr. Co. v. Burns (8th Cir.), 222 Fed. 857, at page 862.

Westwater v. Murray (6th Cir.), 245 Fed. 427, at page 434.

Cyclopedia of Federal Procedure, 1939 Supp., Section 1328, Note, page 816.

U. S. C. A., Title 28, Section 724 (Federal Conformity Act).

Plaintiff's cause of action was a continuing action lawfully commenced under the laws of the State of South Dakota and was not an action brought under any Federal Statute. Section 33.0434, South Dakota Code of 1939, provides:

> "No action shall abate by the death or other disability of a party, or by transfer of any interest therein if the cause of action survive or continue.
>
> "In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

The California Statute is similar to the South Dakota Statute.

Under the above Statute of the State of South Dakota the present action of plaintiff in the Gaynor case survived or continued after any transfer or succession of interests by reason of the enactment of Public Law No. 109 and did not abate. Under the laws of the State of South Dakota the matter of revivor of an action is a matter of right without any limitation of time. A similar situation exists in California.

The rights and obligations governing the transactions involved in the Gaynor case were created under the laws of the State of South Dakota. The right of plaintiff to recover was derived from the State of South Dakota, not from the United States. If the plaintiff Gaynor could maintain his action under the laws of the State of South Dakota he still ought to be allowed to recover in a Federal Court. The State Statute governs in Federal Court.

United States ex rel. Johnson v. Morley Constr. Co. (2d Cir.), 98 F. (2d) 781, at page 785.

Guaranty Trust Co. of N. Y. v. York, 326 U. S. 99, at page 113.

Erie R. R. Co. v. Tompkins, 304 U. S. 817, at page 823.

Klaxon v. Stentor Elec. Co., 313 U. S. 1020, at pages 1021-1022.

In the case of *Cloquet Lumber Co. v. Burns* (8th Cir.), 222 Fed. 857, at page 862, the Court held that under Gen. St. Minnesota, 1913, Section 7685, under which statute no action shall abate by reason of the transfer of interest of a party, if the cause of action continues or survives (identical to the South Dakota statute above referred to), the motion of defendant to dismiss on account of transfer of interest of the plaintiff was properly overruled, as the correct procedure was for plaintiff to move for a substitution of parties and in the absence of plaintiff moving for defendant to move for substitution, especially as defendant's counsel had a copy of the assignment for two years before motion by defendant to dismiss was made. The case had been continued under the name of the original plaintiff. Speaking for the Court, the late Justice Carland said:

> "Considering that the copy of the assignment had been in hands of counsel for two years, a motion to dismiss at the trial had little to commend it to the equitable consideration of the court."

To the same effect is the case of *Westwater v. Murray* (6th Cir.), 245 Fed. 427, at page 434 (7), citing the above case of *Cloquet Lumber Co. v. Burns*, and holding under the Ohio Statute of revivor that the case could be prosecuted to the end either in the name of the transferor (the original party) or in that of the transferee if substitution had been made.

There is no direct conflict between the statute of South Dakota, above cited, and Public Law No. 109, and under the Federal Conformity Act (U. S. C. A., Title 28) the State statute should govern.

The point raised above is fully discussed in the opinion in the case of *Gaynor v. Metals Reserve Co.* (8th Cir.), 166 F. (2d) 1011, at pages 1015 and 1016. The opinion of this Court fails to take into consideration the effect of the South Dakota and California statutes and the rights accruing to litigants thereunder. Likewise this Court's decision fails to apply the Federal Conformity Act (U. S. C. A., Title 28, Section 724).

V.

Public Law 130 was not intended to repudiate any lawful debt or liability or to disturb any vested right.

Gaynor v. Metals Reserve Company, 166 Fed. (2d) 1011, at page 1014.

The right of the plaintiff in the Gaynor case to try on the merits his cause of action, lawfully commenced in the State Court of the State of South Dakota on March 30, 1945, at issue before July 1, 1946, and its trial continued with the consent of the Metals Reserve Corporation before July 1, 1946, was a vested right which the framers of Public Law 109 in Congress did not intend to repudiate or destroy. We quote from the opinion in *Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011, at page 1014.

> "However, under the statutes providing that a dissolution shall not impair rights previously vested, the right to sue or be sued on obligations previously incurred survive the dissolution. We think it important to observe that the act provides specifically

that, 'No suit, action or other proceeding lawfully commenced by or against any such corporation shall abate by reason of the enactment of this joint resolution.' The congressional history plainly indicates that it was the purpose of Congress to protect all vested rights by this positive declaration that the dissolution of the corporation should not disturb such vested rights nor that any action lawfully commenced should be abated. It was not the intention of Congress to repudiate any just debt or liability theretofore incurred."

The opinion of this Court, although it protects a judgment in favor of the transferee under Public Law 109 in a pending cause of action wipes out a hearing on the merits of a just debt or liability upon which an action at law was pending before the passage of the Act of Congress and which had not been reduced to judgment. Under the facts and circumstances shown the interested litigants in the Eighth and Ninth Circuits are entitled to their days in Court on the merits of their causes of action.

The litigants involved are entitled to a rehearing in this Court clarifying and settling the matter of vested rights.

VI.

A pendente assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned.

Ex Parte Railroad, 95 U. S. 221.

Under Public Law 109 all the assets and liabilities of every kind and nature of the designated corporations (including Defense Supplies Corporation and Metals Re-

serve Company) were transferred to the Reconstruction Finance Corporation and were to be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in the Reconstruction Finance Corporation. One of these assets was the cause of action against the respondents herein and one of those liabilities was the right of action of the litigant, Gaynor, against the Metals Reserve Company.

Under the opinion of this Court in the case of *Ex Parte Railroad*, 95 U. S. 221, the Court said:

> "It is well settled that an assignment by a defendant, of his interest in a litigation, does not necessarily defeat a suit. His assignee, taking *pendente lite*, is bound by what is done against him. The assignee may at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own behalf, or he may act in the name of his assignor. A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this, the plaintiffs in the action cannot complain because the assignee is bound by all that is done, whether a party by name or not."

It is difficult to square the reasoning in the above cited case with the result announced in the case now before the Court.

The opinion last referred to is approved in the opinion by the late Chief Justice Taft in the case of *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U. S. 257, with the comment:

"It may be that with the disclosure of all the facts and circumstances we may find that what was done with the consent of all the parties to this suit is in fact a novation which we can make effective."

It should be remembered in the Gaynor case that the cause of action was based on an action for the balance claimed to be due for mica sold and delivered and for damages for breach of contract for the sale of mica; that it was commenced in the State Court of South Dakota in March, 1945, and was not based on any Federal Statute and that the action removed to the U. S. District Court of South Dakota in April, 1945, was *pendente lite* at the time (July 1, 1945) of the passage of Public Law 109. The California action in the instant case was also pending litigation on July 1, 1945.

We submit that this Court's decision is contrary to the rule announced in both the above-referred to cases.

VII.

The word "shall" is ordinarily "the language of command," while the word "may" implies a "permissive" act as used in special contradistinction to the word "shall" used in a mandatory sense in the same legislative act.

Anderson v. Youngkau, 329 U. S. 482.

Hood, Com'r of Banks of N. Car., v. Bell (1st Cir.), 84 F. (2d) 136.

The above quoted clause from Public Law No. 109 that no action lawfully commenced shall abate is mandatory in effect and its language in this respect with the use of the word "shall" is that of "command". Imperative

in effect, it allows no discretion in its application. It creates and amounts to a legislative mandate that "no suit, action or proceeding . . . shall abate by reason of the enactment of this joint resolution." The recent case of *Anderson v. Youngkau* in the United States Supreme Court, reported in 67 S. C. R. 428, at page 430, which is here referred to on the meaning of the word "shall", discusses the use of the word "shall" as used in Rule 25a of the Rules of Civil Procedure, which rule provides that if a party dies and the claim is not thereby extinguished the Court, within two years after the death, may order substitution of the parties, but if substitution is not so made "the action shall be dismissed." In that case the use of the word "shall" was pronounced as "the language of command" and "mandatory". In Public Law No. 109 there is no clause, as there was in Rule 25a, that if substitution is not so made "the action shall be dismissed." Neither is there any such provision as to dismissal in Rule 25c (F. R. C. P.), where a transfer of interests is made during pending litigation.

The distinction between Rule 25a, as it formerly existed, and Rule 25c should be kept in mind.

The dissenting opinion of Mr. Justice Rutledge in the case of *Anderson v. Youngkau*, supra, discusses the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid by statute, rule of Court, or judicial decision, and refers to the work of the Committee which drafted the Rules of Federal Procedure and their action in re-drafting Rule 25a so as to avoid injustices by the rigid time limitation formerly found in that rule.

The remaining clause of Section 2 of Public Law No. 109,

> "but the court, on motion or supplemental petition, petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation,"

is not mandatory and clearly does not negative, qualify, or override the positive and mandatory declaration contained in the preceding clause of said section of the law that "no suit . . . shall abate by reason of the enactment of said joint resolution."

In the case of *Hood, Com'r of Banks of N. Car., v. Bell* (1st Cir.), 84 F. (2d) 136, at page 138, the Court had before it the interpretation of the North Carolina statute, Section 461, Code of North Carolina, 1935, in reference to the survival of pending actions where there had been a transfer of interest. The language used in the North Carolina statute was quite similar to the language employed in Public Law No. 109. At page 138 of the opinion Justice Parker, speaking for the Court, said:

> "The use of the word 'may' in the last clause of the statute was not intended, we think, to confer on the court a discretion to dismiss the action in the teeth of the provision that the action should not abate by a transfer of interest, but merely a discretion to substitute the transferee as a party instead of continuing the action in the name of the original party."

As stated in the case of *Anderson v. Youngkau*, supra, the Court said:

"When the same Rule uses both 'may' and 'shall' the normal inference is that each is used in the normal sense—the one being 'permissive' and the other 'mandatory'."

VIII.

The decision of this Court is contrary to Rule 25c of the Federal Rules of Civil Procedure.

Gaynor v. Metals Reserve Company, 166 Fed. (2d) 1011, at page 1015.

United States ex rel. Johnson v. Morley Construction Co., 98 F. (2d) 781, at page 785 (6.7).

Cyclopedia of Federal Procedure, Section 1328 (see Note, middle of page 816).

U. S. C. A., Title 28, Section 724.

Davis v. Rudolph (Cal.), 181 P. (2d) 765, at page 768.

Rule 25c of the Federal Rules of Civil Procedure was combined and adapted from Section 83, New York Civil Procedure Act, 1937, and the California Code of Civil Procedure (Deering 1937, Section 385). (See Note to Subdivision (c), Title 28, Rule 25c, U. S. C. A. 540.)

In a recent California case the Court, in construing said section of the California statute, said:

"If no substitution is asked for, the case will go on in the name of the original party as if no transfer had been made; and to have it do so, no application or action is necessary."

Davis v. Rudolph, 181 P. (2d) 765, at page 768 (2).

The New York statute is almost identical with Rule 25c. This Court is referred to the opinion of Justice L. Hand in *United States ex rel. Johnson v. Morley Construction*

tion Co. (2nd. Cir.), 98 F. (2d) 781, at page 785 (6,7); cert. denied, 305 U. S. 651.

The case of *Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011, at page 1015, also discusses the application of Rule 25c, Federal Rules of Civil Procedure.

Inasmuch as there is no direct conflict between Rule 25c and the South Dakota statute above referred to, the Federal Conformity Act (U. S. C. A., Title 28, Section 724) is applicable and the State statute should govern.

Certainly there was no intention of Congress in passing Public Law 109 to abrogate Rule 25c or violate the State statutes governing transfers of interest during litigation.

IX.

The language used in the statute does not require substitution.

The first clause of Section 2 of said joint resolution is not followed by a conditioning conjunction or words such as "if" or "provided". It is followed by the word "but", which word is used variously as an adverb, conjunction, and preposition and has a variety of meanings. None of the accepted meanings of the word "but" when used with the word "may", as is done in the clause in question, give it a conditioning or limiting sense as "provided". More often the word "but" is used in the sense of "and", "even if" and "however". None of these meanings of the word "but" would permit the latter clause to override the first clause.

X.

The liability of a named corporation under Public Law 109 was not extinguished under Public Law 109.

Troustine v. Bauer, Pogue & Co., 44 Fed. Supp. 767, at page 771 (7); affirmed, 144 Fed. (2d) 379 (2nd Cir.).

James & Co. v. Second Russian Ins. Co., 239 N. Y. 248, 254, 146 N. E. 369, 370.

The attention of the Court is called to the cases of *Troustine v. Bauer, Pogue & Co.* (D. C., S. D. N. Y.), 44 Fed. Supp. 767, at page 771, and *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 254, 146 N. E. 369.

CONCLUSION

In order that the rights of litigants may be clarified and injustices as shown be prevented, we submit that a rehearing should be granted.

Respectfully submitted.

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Francis J. Parker,
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Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1948.

No. 298.

DEFENSE SUPPLIES CORPORATION,

Petitioner,

vs.

LAWRENCE WAREHOUSE CO. and CAPITOL CHEVROLET CO.,

Respondents.

PETITION FOR RE-HEARING.

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IN THE

Supreme Court of the United States

October Term, 1948.

No. .....

DEFENSE SUPPLIES CORPORATION,

Petitioner,

vs.

LAWRENCE WAREHOUSE CO. and CAPITOL CHEVROLET CO.,

Respondents.

PETITION FOR RE-HEARING.

Your petitioners, Lawrence Warehouse Co., and Capitol Chevrolet Co., respectfully petition for a re-hearing in this Honorable Court upon the following grounds, to-wit:

I.

The decision of the court is based upon a ground not specified nor argued in the petitions or briefs on *certiorari*.

II.

The court erred in its statement of the applicable law in the case. The decision is contrary to the Act of Congress, and has added provisos to the Act of Congress where none were present by which it puts "life into a dead corporation" for litigation purposes, and gives a remedy of suit on a judgment never authorized by Congress.

III.

The court erred in its statement of the facts in the case. The decision is contrary to the facts.

IV.

The court overlooked the effect of this decision and its resulting denial to the respondent of due process of law and its appellate rights guaranteed by the Fifth Amendment to the Constitution of the United States.

I.

The Decision of the Court Is Based Upon a Ground Not Specified nor Argued in the Petitions or Briefs on Certiorari.

This court granted *certiorari* on the theory expressed in the opinion that there was a conflict between the eighth and ninth circuits. The court, in its opinion, never comments on the conflict thereafter; nor does it decide that there was in fact no conflict. The effect of the decision, however, is not only to wipe out our rights in the ninth circuit but also to wipe out the rights of the litigant in *Gaynor v. Metal Reserves* (8th Cir.), 166 F. 2d 1011, and give rights to those opposite to that of a conflict, and to decide the case and give a remedy on grounds not advanced by petitioner nor answered by respondent, nor as provided by Congress.

In fact we have never had our day in this court on the issues now framed and decided by the court without notice or hearing of any kind.

Neither the petition for *certiorari* by the Government nor the brief in support thereof ever urged that all the opinions of the Circuit Court be vacated or that our rights of appeal on the merits be effaced. In the oral argument the court made no suggestion thereof. It was neither pre-

sented nor argued, nor did we ever have a hearing thereon.[1]

It has always been the rule of this court only to consider on *certiorari* the questions raised by the petition and the briefs and to afford both sides an opportunity to be heard. (Rule 38, Revised Rules of Supreme Court of the U. S.) The proceedings herein before this court as they now stand, gave neither side notice or an opportunity to be heard on the question of vacating the judgment of the Circuit Court on the merits and denying the right of appeal to the respondents and others similarly situated; nor on the alleged remedial procedure or proceedings now suggested by the court (particularly in the last paragraphs of the opinion on how petitioner may now proceed) without notice or hearing. This is contrary to Rule 38.

---

[1](a) In the petition for *certiorari* the only question presented by the Government was as follows:

By the Joint Resolution of June 30, 1945 (c. 215, 59 Stat., 310), Congress provided for the dissolution, on July 1, 1945, of Defense Supplies Corporation and certain other government-owned corporations. It was provided, however, that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, a court, on proper showing, might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation. The question is whether, in the absence of the substitution of Reconstruction Finance Corporation within twelve months of Defense Supplies Corporation's dissolution, a court is required to dismiss, as abated, a suit which had been instituted by Defense Supplies Corporation and fully tried before its dissolution, and to vacate, as void, a judgment rendered during that twelve months in favor of Defense Supplies Corporation.

(b) In its brief the solicitor-general said: "The question presented is whether in these circumstances the joint resolution required the judgment to be vacated and the action to be dismissed as abated where no substitution was made and the court was not advised of the statutory dissolution by any of the parties until more than thirty-one months after the event." Reference to the judgment was that of the District Court. (Petitioner's Brief, p. 3.)

Thus, important questions of law have been decided without notice or a hearing, to either litigant, which this court has repeatedly said and which the learned justice of this opinion has said, are the essence of due process of law, "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U. S. 310, 316;

Milliken v. Meyer, 311 U. S. 457, 463;

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;

Gelfert v. National City Bank, 313 U. S. 221, 235 (due notice and opportunity to be heard).

In *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, see footnote 310, U. S. page 520, this court granted a re-hearing where representatives of the State of Texas on their petition for re-hearing stated that they never had an opportunity to be heard on the questions raised.

In *Universal Oil Products v. Root Ref. Co.*, 328 U. S. 580, this court said:

"But obviously, a court cannot deprive a successful party of his judgment without a proper hearing.

"When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void," etc.

Escoe v. Zerbst, 295 U. S. 490, 494, 79 L. Ed. 1566, 1567;

Sunal v. Large, 332 U. S. 174, 183.

There is no hearing or opportunity to be heard when the matter as decided has not been raised by one's adversary or the court or argued therein.

And Mr. Justice Murphy, author of this opinion, has in *Matter of Yamashita*, 327 U. S. 1, 79, 80, said, referring to the Fifth Amendment:

> "Not heretofore, has it been held that any human being is beyond its universally protecting spread in the guarantee of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it."—327 U. S. 79.

We assume this applies also to a corporation, and to proceedings in the Supreme Court and that a corporation, too, has the right to the universally protecting spread of fair notice and fair hearing on an issue fairly made and fully presented to the Supreme Court—elements of due process in its most fundamental sense.

Powell v. Alabama, 287 U. S. 52, 77 L. Ed. 162.

We had originally prepared the record in this case for *certiorari* to this court to test the validity of the trial court's judgment on the issue of negligence, and its failure in our view, to observe the applicable law of California relating to fires from negligence. The fire which occurred was one which took place at a skating rink sought out for and rented during the war at the instigation of the Government. A watchman employed by the Government had supervised and controlled the premises and the persons coming and going therefrom. Adequate fire fighting equipment was not available because of war restrictions on such materials which went to war zones and were solely within the control of the Government. The defendants did not cause the fire. We thought that under the applicable law of the State of California, that no negligence was shown against our client, whose sole alleged

liability were as warehousemen who had themselves exercised due care within the applicable standards of California. Contrary to California standards the trial court had in effect shifted the burden of proof regarding non-negligence to the defense, and we had prepared to test that issue in this Supreme Court when we discovered what Government counsel had concealed—namely the non-existence of the Defense Supplies Corporation, and filed our petition for the hearing in the court below.

To deprive the appellants of their right to test these matters, of whether there was negligence as a matter of law, on appeal, the same as any other litigant, by reason of the Act of Congress dissolving Defense Supplies and the concealment and non-disclosure of those facts by Government representatives fully aware of the matter, at all times, from both the court and opposing counsel and the corporations as private litigants, we submit is neither law nor justice, nor required in a fair construction of the statute herein.

The decision of the court, in effect, without hearing on that point, permits the Reconstruction Finance Corporation to destroy the right of the defendants to appeal and to a decision on the merits by the failure of the R. F. C. to perform the functions it was instructed to perform in the statute by Congress. By failing or refusing to carry out the Congressional mandate to apply for substitution, according to the terms, this court has granted what Congress never intended or expressed, to the Reconstruction

Finance Corporation, namely the power to withhold from these defendants their right of appeal on the merits. Thus this court has placed into the statute two provisos never intended by Congress. If there are others similarly situated, as was suggested as a possibility in the oral argument, they will likewise be affected.

We ask for re-hearing of the decision as we think that the court should vacate its own decision on questions not raised or presented by the writ of *certiorari* (Rule 38). (*White v. Texas, supra; Flourney v. Wiener, supra.*) We should be granted a HEARING on matters not argued or presented by that writ, so that we may brief and argue them.

Rule 38 of the Rules of this court provides:

> "The petition (*certiorari*) shall contain a summary and short statement of the matter involved; * * * the questions presented; and the reasons relied on for the allowance of the writ. *Only the questions specifically brought forward by the petition for writ of certiorari will be considered* * * *."

The decision of the court is now contrary to the court's own rules, which have the force of law.

This court was without jurisdiction of the matters therein considered and determined. (See *Flournoy v. Wiener*, 321 U. S. 253, 88 L. Ed. 708.)[2]

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[2] "But since he failed to raise or brief in this Court any question as to the validity of the Louisiana statute under the Fourteenth Amendment, we have no jurisdiction of the case either on certiorari or on appeal. * * *"

Flournoy v. Wiener, 321 U. S. 253, 263.

II.

The Court Erred in Its Statement of the Applicable Law in the Case. The Court Should Have Dismissed the Writ for Want of Jurisdiction.

Lack of Jurisdiction.

In the decision of this Honorable Court it has conceded that this court has no jurisdiction to consider the merits of the case. This court has said it is without jurisdiction on the merits. Being without jurisdiction on the merits, it is without jurisdiction *at all* and should dismiss the writ as improperly granted. Therefore, if this court has no jurisdiction to consider the merits of the case, who were the petitioners before this court? The Defense Supplies Corporation was dissolved by Congress and had no existence; the Reconstruction Finance Corporation was never permitted to be substituted. The Reconstruction Finance Corporation never petitioned this court for leave to appear as a party. Where was this court's jurisdiction to entertain the petition? Therefore, how could this court lawfully entertain the proceedings without any parties petitioners or plaintiff actually existing? And does this court's "supervisory" jurisdiction permit it to act on a case without an adversary party having some legal authority to appear? Without issues presented by either side and without motion to appear? Mere because they have filed papers in this court?

Congressional Mandate.

But passing on to the next phase of the issue, this court concedes in its opinion that as of July 1, 1945, "the first section dissolved several government corporations including Defense Supplies, and transfers all their assets and authority to the Reconstruction Finance Corporation."

The Act of Congress reads:

> "That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of accounts, record, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved:" (Emphasis ours.)

Therefore, it is clear that from and after July 1, 1945, the Defense Supplies Corporation was without any or ALL functions, powers, duties and authorities and was without documents, books of accounts, records, *assets* or liabilities of any or every kind or nature; and, further, that the Reconstruction Finance Corporation was directed to perform, exercise and administer the functions, powers, duties and authorities of the Defense Supplies Corporation "as if originally vested in Reconstruction Finance Corporation."

If it is possible for the English language to make anything clear, the controlling statute here made clear that contrary to the court's statement the Defense Supplies Corporation did not have "enough life left to litigate its action" and that Congress never intended it to have.

This court has conceded, what must be apparent, that a chose in action, a cause of action, a right to a lawsuit, a

right to a judgment, is certainly an asset such as is described in the controlling statute. (50 C. J. 748, sections 8 and 9.)

Defense Supplies Corporation did not need to "have enough life remaining to litigate its actions" because its actions were transferred by the Act of Congress to the Reconstruction Finance Corporation. Therefore, when Congress transferred all the assets including this asset, it left no life in Defense Supplies Corporation, not even for litigating purposes, as none were necessary.

CONGRESSIONAL HISTORY.

Our interpretation of the joint resolution and the effect thereof, as above set forth, namely,

> that all of the assets and even the authority of the Defense Supplies Corporation was transferred to the Reconstruction Finance Corporation,

is in accord with the Congressional history of the act and contrary to the court's holding herein.

As originally proposed in Congress, the joint resolution consists in its entirety of what is now section 1, and contained no reference whatever to survival of action or substitution. (*Id.* at p. 1, Hearings before Senate Committee on Banking and Currency on S. J. Res. 65, 79th Cong., 1st Sess., p. 2.)

The purposes for which the corporations previously set out in the joint resolution had been accomplished, and it was stated in the Congress that "the transfer to the Reconstruction Finance Corporation of the functions, powers,

duties, and authority of these corporations would simplify operations and it may reasonably be expected that some economy in operation can be effected."

> "The original language was intended and was apparently considered sufficient, to make RFC responsible for all liabilities and contracts of the dissolved corporations." (*Id.* at pp. 10-11.)

While no specific mention was made of assets in court proceedings, the language of section 1 provides for administration by RFC "in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation." This clearly indicates that Congress had transferred the cause of action to RFC.

Section 2, which added the provisions as to a duty to appear in court and show a necessity for continuation of the action, was designed apparently with the intent of creating a right and a duty upon RFC to follow the procedure therein set forth (else as now this court suggests the words are meaningless) and also to give right and duty to other litigants or creditors in enforcing rights against RFC, if they acted within the year. It was a two-way street with the rules of the road the same for all users thereof, whether government or private.

In the hearings in Congress Senator Taft said: "In regard to the legal implications of this bill—whether there should be a specific statement that R.F.C. shall become responsible for the liabilities and contracts of these corporations," and "whether it might not be desirable, in order that contractors might not be in doubt, to have the

express statement that all liabilties and *contracts* of these corporations shall be passed on to R.F.C. and that *R.F.C.* shall become responsible for them." (Emphasis ours.) (*Id.* at pp. 10-11.) John W. Snyder, Federal Loan Administrator, testified for the RFC that "that was the intention." Senator Taft then suggested a clarifying amendment to be drafted by *RFC* general counsel, and it was this measure that became section 2. (91 Cong. Rec. 4782, 5628; S. Rep. No. 285, 79th Cong., 1st Sess.) The measure was passed by the Senate without discussion. (91 Cong. Rec. 5628.)

It thus is apparent that Congress intended that everything should pass to the RFC at the time of the resolution and that RFC was from that time on, both by the requirements of Congress, should have all assets and that nothing was left in the possession DSC (even the right to continue to litigate) for that right was unnecessary since RFC had that right transferred to it.

"A chose in action is property." (See 14 C. J. S., p. 1114, under the definition of "chose in action" and 15 C. J. S., pp. 763-764, defining "chose in action." See also 50 C. J. 738, secs. 8 and 9.)

That Congress had transferred these "chose in action" to the Reconstruction Finance Corporation by its joint resolution is clear not only from the language of the section but from the history of the Congressional action. Therefore, this court was in error and added language to the statute in holding that Defense Supplies Corporation "continued on for a litigating purpose" for there was nothing left for it to litigate and the rights had been transferred.

III.

RFC, Not DSC, Had Twelve Months to Continue the Action if It Chose.

The purpose in preventing the action from abating thereafter for 12 months was therefore to let *Reconstruction Finance Corporation* continue with the action, not to let the defunct *Defense Supplies* continue with the action. And Reconstruction Finance Corporation could maintain the action upon making the showing as set out by Congress in section 2 of the Act. We did not maintain, and do not maintain now, that the cause of action was not transferred to Reconstruction Finance Corporation as of July 1, 1945. What we did maintain, and what we do maintain, is that the particular action *in the name of Defense Supplies Corporation* was transferred to Reconstruction Finance Corporation for its action in whatever way it saw fit if it complies with the mandate of Congress with court consent. Many reasons might have dictated it not to wish to maintain the action further. To give it this construction, we submit, is to give it the construction which Congress intended it to have, rather than add the proviso to permit the dead corporation to continue "with life for litigating purposes" which Congress did not permit it to have. Also to permit Reconstruction Finance Corporation to have the cause of action would have permitted that corporation to proceed if it desired on its cause of action and to enable the defendants who do not carry the burden of proof or of maintaining the action to meet the cause of action, and to have the right of appeal on the merits which due process of law permits the appellant to have. We submit that Congress did not intend to strip the respondents herein, or anyone, of any former rights, including the right to appeal or the right to test the validity of the judgment below in the Court of Appeals, or in this

court. **The construction which this court has now placed upon the Act of Congress deprives us of both, and permits the trial court to enter a judgment in favor of a dead corporation who at the time of the entry of the judgment, had not only ceased to exist, but had transferred all of its assets and authority to the Reconstruction Finance Corporation. What could be left to enter judgment on, therefore, we submit, is not clear, since Congress has stripped all authority from Defense Supplies Corporation, and by the same token has stripped the trial court of all authority to enter judgment for such deceased corporation, and has already transferred the chose in action to RFC.**

We agree with this court that the statute categorically says that no action shall abate, but that the statute also has already transferred, by reason of the statutory authority, all of the assets and authority to the Reconstruction Finance Corporation. Therefore, the statute must be read in its entirety as stating that no action possessed by or on behalf of the Reconstruction Finance Corporation shall abate provided that within twelve months it makes the necessary showing. It did not say that no action shall abate as far as the Defense Supplies Corporation was concerned, as it had taken all of its assets and even its name, and dissolved it completely. Such a proviso was unnecessary as far as DSC was concerned, since it then had nothing to abate. It owned no action any longer. It in fact had nothing—not even a name.

The words "no action shall abate" cannot be stripped from the other portion of the statute which has transferred that action to the Reconstruction Finance Corporation and provided, as this court has said, for a certain mode and means of Reconstruction Finance Corporation asserting its desires and its authority.

The other section of the statute was passed providing for certain other conditions for Reconstruction Finance Corporation, or anyone else, to show a necessity for a survival of the action. That is, that there must be a petition to the court showing a necessity for the survival and a court must approve of the showing. Congress used these words intentionally.

This court as it has now construed the statute, has made these words meaningless because it has held:

(a) That even though Congress transferred the asset, to-wit, the lawsuit, to Reconstruction Finance Corporation, it really hadn't transferred the asset to Reconstruction Finance Corporation, and Defense Supplies still possessed it.

(b) That although the statute required the Reconstruction Finance Corporation to make a showing in court and receive judicial approval for necessity of survival of the action within twelve months and receive judicial approval, that it is not necessary to show a survival of the action was necessary or to receive judicial approval, and

(c) That even though none of the Congressional mandates are observed that the trial court can enter judgment in favor of a dead corporation that has no name, that has no assets, that has no right and no authority, and without the judicial showing and approval that Congress said was necessary in the event such a transfer was made. And it says further (this never being discussed or argued in this court) that Reconstruction Finance Corporation may now sue by a special proceeding to enforce a judgment entered in favor of a dead corporation, who had no assets and no

authority at the time of the entry of the judgment. We submit that this is contrary to the law and the facts, and is judicial legislation in its broadest sense.

The court has accomplished the extraordinary result by the use of the following language:

> "If Reconstruction Finance is not substituted within one year, the action by or against Defense Supplies is, of course, at an end and the parties are left in *status quo*."

This portion of the sentence apparently means that unless the Reconstruction Finance Corporation is substituted the parties were relegated to such rights as they had before the litigation was commenced. Assuming that that is what the court's language means, the court then proceeded to state:

> "But there is nothing to show that during the year in which Reconstruction Finance may be substituted, action by or against Defense Supplies cannot continue in Defense Supplies' name."

If the second portion of the sentence means what it says, then the first portion of the sentence is meaningless. If the action can continue without RFC, then obviously the parties are not left in *status quo*. Also, it is perfectly clear that the sentences do not state the facts. There is certainly nothing in the statute that says the action may be continued in Defense Supplies' name. Defense Supplies, after July 1, 1945, had no name. There was no longer a legal entity, in name or in any other capacity. It had lost its asset—the chose in action the lawsuit, by transfer.

The court then proceeded to state:

> "If Congress states that no action shall abate, we fail to see why we should make additional language a proviso."

If this sentence has any meaning, it is apparently intended to mean that the court does not feel it should add a proviso to the Congressional mandate. With that proposition we are in accord. But, if the court intends the statement as a statement of fact, it is erroneous as Congress already added the proviso, and did not leave it to the court to make the addition. The addition in the statute of Congress after the reference to the "abatement" begins with the word "*but*" which is clearly not used in the conjunctive but is used in the more common sense of a proviso—an "objection," "restriction" or "exception." (See Webster's Unabridged Dictionary, definition of the word "but.") Then follows this statement:

> "And since the District Court entered its judgment during the year allowed for substitution of the RFC, we conclude it was valid when entered."

There certainly is nothing in the preceding sentence which would justify any such conclusion. The court merely states that notwithstanding the complete dissolution of Defense Supplies and the fact that the Congressional mandate did not permit Defense Supplies to litigate after its death, nevertheless in the teeth of the statute a valid judgment could be entered in its name after the dissolution. No authority, statutory or otherwise, is cited for this extraordinary conclusion. As none could be.

A decision involving $42,000 is small and inconsequential, in the vast scheme of things, but the principles herein

involved are important. The measure of power is the statute and the mode and manner it provides. Salutary upon government corporations and their officers is the fact that they, too, must comply with the statute to assert the rights they claim. (*Cudahy Packing Co. v. Holland*, 315 U. S. 357), and that this court measures all power and jurisdiction by the express words of Congress, which can grant or withdraw jurisdiction even from courts.

IV.

The Court Erred in Its Statement of the Facts in the Case. The Decision Is Contrary to the Facts.

The court also says, in supporting its position, that the judgment was not robbed of its vitality by the abatement of appellate proceedings. The latter conclusion adheres "to the familiar rule that a judgment against or in favor of a corporation is not erased by subsequent dissolution." This has only been a rule of state law, not of federal law, where the courts are bound under the Seventh Amendment by the common law. At common law an action abates with the dissolution of a corporation.

Here the dissolution was prior to the entry of any judgment, not *subsequent* to any entry of judgment, hence this court erred in its statement of the fact and position herein.

Furthermore, this court says that respondents are not in a position to object that they did not perfect an appeal, because the Court of Appeals had no jurisdiction when respondents could have remedied the defect by a motion to substitute the Reconstruction Finance Corporation. Con-

gress did not place this burden on us, but upon the party seeking to maintain his suit or judgment.

It has always been held that the plaintiff in an action has the burden of maintaining his suit throughout all of the proceedings. This holding is now changed by this Honorable Court.

Furthermore, we have a peculiar situation in the present case wherein Government counsel were aware from the start of the dissolution of its corporation (see opinion of Ninth Circuit Court before whom governmental counsel made the admission, yet they proceeded in entire silence throughout the appellate proceedings in the trial court, and throughout the appellate proceedings without any disclosure to court or counsel of the situation in which they no longer represented a corporation or had an asset in it. Was this not fraudulent concealment from the court? If the rule now set out by this court in this case is to stand, it means that every time a Government corporation has a suit against a private litigant that it becomes incumbent upon the private litigant not in touch with the Government office or every issue of the Congressional Record to check up and see if the corporation, doing business as private persons, is still in existence or if Congress has dissolved it. Certainly this should not be the burden of the defendant or the party doing business with the Government. Such a holding is highly unfair to litigants in a private capacity doing business with the Government. Certainly Government officers are, and should be, charged with the duty of prompt disclosure and to be required to

take all of the necessary steps to protect not only themselves, but the litigants on the other side. In a measure Government officers and attorneys at law, like United States attorneys, represent not only themselves but all of the people. They are not merely the spokesmen of the litigating Government corporation, they are the representatives of the people who pay their taxes and with whom they are doing business. Speaking of United States attorneys this court has said:

> "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.' Berger v. United States, 295 U. S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629. Compare New York C. R. Co. v. Johnson, 279 U. S. 310, 316-318, 73 L. Ed. 706, 710, 49 S. Ct. 300."

Viereck v. U. S., 318 U. S. 248, 87 L. Ed. 741.

We think the same applies to any Government attorney and that he has the duty to disclose—not to conceal—matters which would affect the substantial rights of the parties and to protect even the opposing litigant and Appellate Court in any change of corporate structure. Fur-

thermore, litigants have a right to presume that official duty is being regularly performed, and that Government counsel would not permit either court or counsel to conduct a trial or appeal in which there was no longer a party plaintiff and over which the Appellate Court had no jurisdiction, and which would be a waste of the taxpayer's money.

The Temple of Justice should not be defiled by improvidently assumed jurisdiction for any purpose whatsoever.

This court, the greater teacher, should protect the purity of all courts. Governmental misconduct, by any of its officers or agents, should be as severely dealt with as an illegally gotten confession by a police officer (*Chambers v. Florida*, 309 U. S. 227) or appeals to passion (*Viereck v. U. S.*, 318 U. S. 348). A judgment, so gotten or maintained, should be stricken for want of jurisdiction and due process, which dictates that the procedure likewise be fair. (Justice Roberts in *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674.)

And see:

Sorrells v. U. S., 287 U. S. 457, 77 L. Ed. 425

Olmstead v. U. S., 277 U. S. 438, 483, 485

"The protection of its own functions and the preservation of the purity of its own Temple belongs only to the court."

Sorrells v. U. S., 287 U. S. 457.

V.

The Court Overlooked the Effect of This Decision and Its Resulting Denial to the Respondent of Due Process of Law and Its Appellate Rights Guaranteed by the Fifth Amendment to the Constitution of the United States.

The holding of this court, which would deprive these respondents of their right to test the validity of the original judgments on appeal, certainly would be a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. (See *Woods v. Hills*, No. 437, October Term 1947; 16 Law Weekly 4446, 4447; also *Yakus v. United States*, 321 U. S. 414.)

THE DECISION OF FIX V. PHILADELPHIA BARGE CO.

This court has also overlooked the effect and language of, or over-ruled, *Fix v. Philadelphia Barge Co.*, 290 U. S. 532, 78 L. Ed. 483 (1934). There the court held that the failure to comply with the statute foreclosed the particular remedy, but not the cause of action.

In *Fix v. Philadelphia Barge Co.*, 290 U. S. 532, 78 L. Ed. 483, which this court decided in January, 1934, the court held that section 11 of the Act of 1925 is an extension of the Act of February 8, 1899. That case distinguishes a clear difference between the action and the cause of action. Revival of the action is necessary because that does not survive the death or the resignation of the officer in the action, but the *cause* of action may survive depending upon its nature in the applicable rule.

We urge this court, therefore, to hold that Reconstruction Finance Corporation had assigned to it by a joint resolution of January 30, 1945, the cause of action; that that cause of action survived, even though the particular action which had not then been completed died. When the mandate of Congress had not been complied with by R. F. C., such a holding would be in accordance with the clear intent of Congress to give R. F. C. that "*chose* in action" and permit R. F. C. to proceed in accordance with that transfer. Such a holding would not deprive respondent of its right to litigate or appeal from any action taken by R. F. C. and it would do law and justice in the case and comply with Congressional mandates. A contrary holding results in giving a judgment to a dead and defunct corporation not maintained by Congress for any purposes and deprives us of our day in the trial and appellate courts on the merits and on any defenses we may have.

We conclude, therefore, that this court was without jurisdiction of the subject matter decided by the decision, for it was neither raised nor presented on the petition for *certiorari*, nor in the oral argument; that the decision, without notice or without hearing, offends the basic fundamental rights of the respondents here to notice and due process of law; that it deprives the respondents herein of a hearing on the subject matter decided and of their constitutional rights of appeal without a hearing on that subject; that the decision is contrary to the specific Act of

Congress involved, and the plain language thereof, as well as the Congressional intent in passing the Act.

This court has never been afraid to grant a re-hearing where it has been shown to have been mistaken in its decision, and even to have granted a second re-hearing where it had overlooked or failed to consider fundamental rights involved in a case which had not theretofore been fully or properly considered by this court, and right the error.

Zap v. U. S., 326 U. S. 802, 90 L. Ed. 488.

It has always been the law that the person seeking to maintain litigation must maintain it throughout.

If this court has improperly granted the writ it will dismiss for want of jurisdiction. *Superior Court v. Lillefloren*, No. 191, October 1948 term.

We submit and pray that a re-hearing should be granted and this court's judgment vacated and set aside.

Respectfully submitted,

LAWRENCE WAREHOUSE CO. and
CAPITOL CHEVROLET CO.,

By MORRIS LAVINE and
WILLIAMSON AND WALLACE,
Attorneys.

Certificate of Counsel.

I, MORRIS LAVINE, one of counsel for Respondents herein, certifies that the foregoing petition is presented in good faith and not for delay, and that the petition is confined to intervening circumstances of substance and controlling effect which have arisen by reason of the opinion of the Supreme Court of the United States rendered on April 18, 1949, and that the petition for re-hearing is restricted to the grounds arising by reason of the said opinion and matters therein set forth.

MORRIS LAVINE,
Attorney for Respondents.